1989

First Federal Saving and Loan Association of Salt Lake City v. Gump and Ayers Real Estate, Inc. and Air Terminal Gifts, Inc. : Petition for Writ of Certiorari

Utah Supreme Court

John W. Lowe; Attorney for Appellant.
Walter P. Faber, Jr.; Attorney for Defendant.

IN THE SUPREME COURT OF THE

STATE OF UTAH

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SALT LAKE CITY, Plaintiff-Appellant, vs. GUMP & AYERS REAL ESTATE, INC. and AIR TERMINAL GIFTS, INC., Defendant-Respondent-Petitioner.	Cert No. 890166 Category No. 13 Court of Appeals Case No. 880331-CA

PETITION TO THE SUPREME COURT OF THE STATE OF UTAH
BY AIR TERMINAL GIFTS, INC.
FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The following questions presented for review are important questions which appear to be of first impression concerning the limitations on negotiability and holder in due course status under the particular statutory provisions and should be settled by this court rather than the Court of Appeals. Furthermore, to allow the Court of Appeals' decision to stand would result in a gross miscarriage of justice because §70A-3-304(2) (Utah Code Ann. 1965), indisputably eliminates First Federal as a holder in due course as is discussed hereinafter.

I. Did the Court of Appeals wrongly ignore the undisputed and critical fact that the Air Terminal note and its contemporaneous accompanying Purchase and Security Agreement

were assigned and delivered to First Federal together as a package pursuant to words of assignment prepared by First Federal, and then wrongly hold that the wording in the note that "reference is made to the Purchase and Security Agreement for additional rights of the holder hereof" did not impair negotiability under §70A-3-104(1)(b) which states that to be negotiable an instrument must contain "no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; . . ."?

II. Whether the Court of Appeals' decision reversing the trial court's judgment that the Air Terminal note was not negotiable and First Federal was not a holder in due course conflicts with this court's decision in Calfo v. D. C. Stewart Co., et al., 30 Utah Adv. Rep. 8, 717 P.2d 697 (Utah 1986), concerning what constitutes notice to and knowledge of a potential infirmity to a holder such as First Federal under the circumstances herein?

III. Whether the Court of Appeals wrongly reversed the trial court (a) by holding that First Federal was a holder in due course because it had no notice of a claim or defense under §70A-3-304(2) even though Gump & Ayers, a fiduciary, received $18,500 from the $100,000 loan First Federal made to Gump & Ayers because receipt of such amount by Gump & Ayers was not a "benefit" under the statute, and (b) by wholly failing

to consider another portion of §70A-3-304(2) under which First Federal was absolutely charged with notice of a claim when Gump & Ayers, a fiduciary, assigned the Air Terminal note and accompanying agreement to First Federal as security for Gump & Ayers' own $100,000 debt?

IV. Did the Court of Appeals misinterpret §70A-3-119(1) and §70A-3-304(1) in holding that First Federal was a holder in due course even though First Federal received the Air Terminal note and agreement together and even though the agreement indicated that there were limitations and that Air Terminal's obligation was partly or wholly voidable?

REFERENCE TO THE COURT OF APPEALS' OPINION

The Court of Appeals' opinion is reported in First Federal Savings & Loan Association v. Gump & Ayers Real Estate, Inc. and Air Terminal Gifts, Inc., 105 Utah Adv. Rep. 27 (April 11, 1989). A copy of the Court of Appeals' decision is included in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals' decision was entered on April 4, 1989. There was no petition for rehearing filed, no request for an extension of time in which to file for rehearing, and no order entered in regard to a rehearing. Jurisdiction is

conferred upon the Utah Supreme Court by §78-2-2(3)(a) and (5) (Utah Code Ann. 1988).

STATEMENT OF CONTROLLING STATUTORY PROVISIONS

The controlling statutory provisions together with added underlining of the critical portions thereof are:

1. §70A-3-104(1)(b) (Utah Code Ann. 1965) Form of negotiable instruments . . .

> (1) Any writing to be a negotiable instrument within this chapter must
>
> . . .
>
> (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; . . . (Emphasis added.)

- - - - - - - -

§70A-3-105 (Utah Code Ann. 1965). When promise or order unconditional.

> (1) A promise or order otherwise unconditional is not made conditional by the fact that the instrument
>
> (a) is subject to implied or constructive conditions; or
>
> (b) states its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or
>
> (c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration; or

(d) states that it is drawn under a letter of credit; or

(e) states that it is secured, whether by mortgage, reservation of title or otherwise; or

(f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or

(g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or

(h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

(2) A promise or order is not unconditional if the instrument

(a) states that it is subject to or governed by any other agreement; or

(b) states that it is to be paid only out of a particular fund or source except as provided in this section.

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§70A-3-112 (Utah Code Ann. 1965). Terms and omissions not affecting negotiability.

(1) The negotiability of an instrument is not affected by

(a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

(b) a statement that collateral has been given to secure obligations either on the instrument or

otherwise of an obligor on the instrument or that in the case of default on those obligations the holder may realize on or dispose of the collateral; or

(c) a promise or power to maintain or protect collateral or to give additional collateral; or

(d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

(e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

(f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

(g) a statement in a draft drawn in a set of parts (Section 70A-3-801) to the effect that the order is effective only if no other part has been honored.

. . .

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2. §70A-3-119 (Utah Code Ann. 1965). Other writings affecting instrument.

(1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument. (Emphasis added.)

(2) A separate agreement does not affect the negotiability of an instrument.

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3. §70A-3-304(1)(b) and (2) (Utah Code Ann. 1965). Notice to purchaser.

(1) The purchaser has notice of a claim or defense if:

. . .

(b) the purchaser has notice that the obligation of any party is voidable in whole or in part, . . .

(2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty. . . . (Emphasis added.)

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§70A-3-302(1)(c) (Utah Code Ann. 1965). Holder in due course.

(1) A holder in due is a holder who takes the instrument

. . .

(c) without notice . . . of any defense against or claim to it on the part of any person. . . .

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STATEMENT OF THE CASE

First Federal sued Gump & Ayers on its $100,000 promissory note payable to First Federal and sued Air Terminal on its $125,000 promissory note payable to the Sunayers limited

partnership of which Gump & Ayers was the general partner. When Gump & Ayers executed the $100,000 note, Gump & Ayers assigned the Air Terminal note and its companion Purchase and Security Agreement to First Federal as security for the Gump & Ayers' note. The trial court granted summary judgment to First Federal on the Gump & Ayers' note but denied summary judgment on the Air Terminal note.

After a trial of the issues between First Federal and Air Terminal, the trial court held that First Federal had received the Air Terminal agreement and note as companion parts of a single package transaction; that the Air Terminal note incorporated rights in the accompanying agreement and thus contained other powers which precluded negotiability; that First Federal knew that Gump & Ayers was a fiduciary and that First Federal had knowledge and notice of a limitation in the companion agreement and of a claim against the Air Terminal note under the applicable statutes. The trial court rendered judgment that the Air Terminal note was not negotiable and that First Federal was not a holder in due course because of actual knowledge and notice and was therefore subject to Air Terminal's defenses against Gump & Ayers and Sunayers.

The Court of Appeals reversed the trial court's decision and held that the Air Terminal note was negotiable and that First Federal was a holder in due course.

STATEMENT OF FACTS

The following facts are divided into numbered paragraphs to make reference thereto more convenient:

1. Air Terminal agreed to invest $200,000 in the Sunayers Limited Partnership on June 5, 1984 by paying $75,000 in cash and executing a thirteen (13) page Purchase and Security Agreement ("purchase agreement") together with a contemporaneous and integrated companion promissory note in the amount of $125,000. The Air Terminal purchase agreement specifically incorporates the note in paragraph 2 thereof and the note specifically refers to the purchase agreement "for additional rights of the holder hereof." Copies of the Air Terminal note and purchase agreement were introduced as Trial Exhibits 4 and 5, and are included in the Appendix.

2. Under the Air Terminal purchase agreement Sunayers is given the rights to sell the security, to charge expenses, sell the partnership interest, declare a forfeiture, power of attorney, delivery of assets, execution of documents and all other "remedies under law." (Trial Exhibit 5.)

3. The Air Terminal note (Trial Exhibit 4) contains the following statement on page 2 just above the signature line:

> Reference is made to the Purchase and Security Agreement for additional rights of the holder hereof.

4. The Air Terminal purchase agreement and note were parts of a contemporaneous, integrated, package transaction. (See T. 27-30; Conclusion of Law No. 2, R. 501.)

5. After the Air Terminal purchase agreement and note were signed, Gump & Ayers, the general partner of Sunayers, borrowed $100,000 from First Federal, signed a promissory note (Gump & Ayers' note) for that amount which note does not indicate the purpose of the loan, and assigned the Air Terminal note and purchase agreement to First Federal as security for the Gump & Ayers' note. (T. 8, 13.)

6. The original Gump & Ayers' note and subsequent renewal notes were prepared by First Federal (T. 15) and each refers to the Air Terminal note and purchase agreement by the following statement which is typed on the bottom of the Gump & Ayers' note (Trial Exhibit 3):

> The indebtedness evidenced by this note is secured by a Promissory Note dated June 5, 1984 and a Security Agreement of even date.

A copy of the last renewal Gump & Ayers' note which was the note sued upon is included in the Appendix.

7. First Federal was the author of the following statement of assignment by Gump & Ayers to First Federal typed on the bottom of the Air Terminal note at the time of assignment (T. 14):

> Sunayers hereby assigns, with recourse, all of its right, title and interest in the above promissory note and the agreement securing it to First Federal Savings and Loan Assn. of Salt Lake City.
>
> Sunayers Limited Partnership
> by Gump and Ayers
> Real Estate, Inc.
> Its General Partner

8. The amount of First Federal's $100,000 loan to Gump & Ayers was based upon Gump & Ayers' written list to First Federal showing that the loan was in part to pay Gump & Ayers $18,500 and to cover the Morse shortfall which Air Terminal was indemnified against by the purchase agreement. (Trial Exhibit A; T-39.) There was no evidence that the $18,500 was a "debt" owed Gump & Ayers or was for any other specific purpose except that it was on the Gump & Ayers' list below the wording "ITEMS DUE TO MORSE SHORTFALL." (See T. 19-20.) A copy of Gump & Ayers' list is included in the Appendix.

9. The Court of Appeals' opinion does not refer to the fact that the Air Terminal note and accompanying purchase agreement were assigned to First Federal as a package for security and does not discuss how such fact would affect the issues of negotiability and First Federal's claim that it was a holder in due course. (See Court of Appeals' opinion pp. 28-31.)

10. The Court of Appeals' opinion states that the $18,500 Gump & Ayers received from the $100,000 loan was a "debt due Gump & Ayers." (Court of Appeals' opinion p. 28.)

11. The Court of Appeals principally bases its holding that the Air Terminal note was negotiable on its conclusion that the Air Terminal note was unconditional. (See Court of Appeals' opinion p. 28.)

12. The Court of Appeals' opinion concludes that First Federal is a holder in due course because although Gump & Ayers was a fiduciary, Gump & Ayers received no "benefit" from the First Federal loan and because Gump & Ayers did not breach its fiduciary duty in assigning the Air Terminal note to First Federal. (See Court of Appeals' opinion pp. 29-30.)

ARGUMENT

QUESTION I. DID THE COURT OF APPEALS WRONGLY IGNORE THE UNDISPUTED AND CRITICAL FACT THAT THE AIR TERMINAL NOTE AND ITS CONTEMPORANEOUS ACCOMPANYING PURCHASE AND SECURITY AGREEMENT WERE ASSIGNED AND DELIVERED TO FIRST FEDERAL TOGETHER AS A PACKAGE PURSUANT TO WORDS OF ASSIGNMENT PREPARED BY FIRST FEDERAL, AND THEN WRONGLY HOLD THAT THE WORDING IN THE NOTE THAT "REFERENCE IS MADE TO THE PURCHASE AND SECURITY AGREEMENT FOR ADDITIONAL RIGHTS OF THE HOLDER HEREOF" DID NOT IMPAIR NEGOTIABILITY UNDER §70A-3-104(1)(b) WHICH STATES THAT TO BE NEGOTIABLE AN INSTRUMENT MUST CONTAIN "NO OTHER PROMISE, ORDER, OBLIGATION OR POWER GIVEN BY THE MAKER OR DRAWER EXCEPT AS AUTHORIZED BY THIS CHAPTER; . . ."?

The Court of Appeals' opinion does not mention, either in its recitation of facts or discussion, the undisputed fact that First Federal received the Air Terminal purchase agreement and note together as a package for security purposes which fact and surrounding circumstances are essential to

a fair analysis of the issues and of the trial court's decision. The above undisputed fact raises a number of pertinent questions in this case discussed hereinafter both as to negotiability and holder in due course status that would not exist in a situation where the holder received only the note, i.e.:

> (a) Whether the reference in the note to the accompanying purchase agreement for "additional rights of the holder hereof" is merely an inconsequential reference to a "separate" agreement under the statute which does not affect negotiability as the Court of Appeals determined, or is the reference more reasonably interpreted under the circumstances as wording of incorporation which adds an impermissible "promise, order, obligation or power" as the trial court held?
>
> (b) Whether the language "no other promise, order, obligation or power" in §70A-3-104(1)(b) is a separate requirement for negotiability and not merely an additional test to determine whether an instrument is unconditional or conditional as the Court of Appeals seems to be saying?
>
> (c) Does "separate agreement" mean a situation where the accompanying agreement is not transferred as a part of the same package or where there is no wording that can reasonably be interpreted to be words of incorporation?
>
> (d) What is the legal effect of the knowledge of and notice to First Federal who prepared the joint assignment to itself of the note and accompanying agreement as security for its loan to Gump & Ayers, a fiduciary?

To be negotiable a promissory note must be the equivalent of cash and must strictly conform to the restrictions in the statute. Calfo v. D. C. Stewart Co., et al., Utah Adv. Rep. 8, 717 P.2d 697 (Utah 1986). The principal statutory provision applicable to negotiability is §70A-3-104(1)(b) which states as follows:

> (1) Any writing to be a negotiable instrument within this chapter must
>
> . . .
>
> (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; . . . (Emphasis added.)

The statutory powers given by the maker which escape the above prohibition on negotiability are listed in §70A-3-105 and §70A-3-112(1). Thus, if the instrument "contains" any "promise, order, obligation or power" other than those listed in the statute, then the instrument is not negotiable.

In 5 Anderson, Uniform Commercial Code, §3-104:9, the above provision concerning "no other promise . . ." is discussed as follows:

> The language of the code provision under consideration declaring that "no other promise . . ." may be included appears so categorical that it is concluded that it must be given its literal effect. This conclusion has the further advantage of practical expediency in that it avoids any question of construction as to whether an additional promise is or is not a promise of such a character as to impair negotiability. The above conclusion provides a standard which the ordinary man in business can apply for it merely requires the ability to read the words of the instrument and see if there is an additional promise. Otherwise stated, it avoids the complicated interpretation of additional words in an instrument and avoids the hazard that a court at a later date might not agree with the conclusion reached by the businessman reading the instrument. (Emphasis added.)

Courts which have addressed the applicability of the second part of subsection (b) of the above statutory provision have held it to be absolute in denying negotiability. In Geiger Finance Company v. Graham, 182 S.E.2d 521, 524 (GA 1971), the court stated that:

> If a writing contains any other promise, order, obligation or power, it is simply not a negotiable instrument and the concept of a holder in due course does not apply. . . . The intent is that a negotiable instrument carries nothing but the simple promise to pay, with certain limited exceptions. . . .

The Court of Appeals' discussion of negotiability focuses on §70A-3-105(c) which allows the instrument to refer to or arise out of a separate agreement which may contain rights of prepayment and acceleration. The instrument may also contain a statement that it is secured by collateral and a right to realize or dispose of collateral under §70A-3-112(1)(b). The Court of Appeals seems to be basing its discussion of negotiability principally on whether the promise or order is conditional or not under the first part of §70A-3-104(1)(b) rather than the second part which appears to require that the instrument must also contain "no other promise, . . ."

Although those two statutory requirements appear to be separate and distinct, the Court of Appeals combines them in its holding that the Air Terminal note is unconditional

and therefore negotiable. The problem is not whether the Air Terminal note may be conditional or unconditional under the first part but whether the instrument contains a prohibited promise, order, obligation or power which would separately preclude negotiability. The Air Terminal note contains the following words:

> Reference is made to the Purchase and Security Agreement for additional rights of the holder hereof.

Even if the accompanying purchase agreement were ignored for the sake of argument, there are two related questions raised by the above wording in the Air Terminal note which must be answered to resolve the issue of negotiability. The first question is whether the words "additional rights" in the note are the equivalent of and have essentially the same meaning as a "promise, order, obligation or power" in the statute. It is submitted that the words "additional rights" in the Air Terminal note are the reasonable equivalent of and would be included at least under the word "power" contained in the statute. Webster defines a "right" as a power. See Webster's Third New International Dictionary of the English Language, G & C Merriam Company 1971. The second question then to be considered is what is the meaning of the word "contain" used in the statute and whether under such meaning the Air Terminal note "contains" any other power which would make the note non-negotiable.

The words in the note "for additional rights of the holder hereof" are most reasonably interpreted as words of incorporation because the holder is specifically directed to the holder's rights in the accompanying purchase agreement which was contemporaneously transferred to First Federal with the note as a package. Those rights include a power of attorney and the right to execute documents, to charge expenses and pay taxes, among others.

If the note had merely referred to the purchase agreement and not stated that the agreement contained "additional rights of the holder hereof" then perhaps there would not be an incorporation. The most reasonable interpretation of those words in the note is that the note and accompanying purchase agreement were to be construed as one document. Certainly First Federal considered the note and purchase agreement to be a single package because First Federal prepared the assignment which absolutely ties the two documents together.

Even though a separate agreement does not affect negotiability under §70A-3-119(2) the question in this case is whether the accompanying purchase agreement should be considered as a "separate agreement." It is submitted that under the wording in the note and the fact of simultaneous assignment, the agreement in this case should not be considered as separate. 5 Anderson, Uniform Commercial Code, §3-101:15

states that ". . . if there is any doubt as to whether a paper is negotiable, it is held to be non-negotiable." The obvious policy reason for the above rule is to prevent claims of negotiability in doubtful situations such as this one.

In 10 C.J.S., Bills and Notes, §44(b) it is stated as follows:

> . . . where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other, notes or bills of exchange and contemporaneous written agreements executed as part of the same transaction are to be construed together as forming one contract in a controversy between the original parties or persons standing in their situation or charged with notice of the contemporaneous agreements.
>
> This general rule applies especially where the agreement relates to consideration yet to be earned, or where the note contains an express reference to the agreement, . . . (Emphasis added.)

Also see 5 Anderson, Uniform Commercial Code, §§3-104:7; 3-119:6; Bank of Kimball v. Rostek, 423 P.2d 579 (Colo. 1967). Any provision in the subject instrument that creates uncertainty eliminates negotiability.

None of the cases relied on by the Court of Appeals to support its holding of negotiability, Third National Bank in Nashville v. Handi-Gardens Supply of Illinois, Inc., 380 F.Supp 930 (D. Tenn. 1979); Federal Factors, Inc. v. Wellbanke, 241 Ark. 44, 406 S.W.2d 712 (Ark. 1966); and First National City Bank v. Valentine, 62 Misc. 2d 719, 309 N.Y.S.2d 563 (NY 1970), involve a situation where the note and

accompanying purchase agreement were taken simultaneously as a single package pursuant to the holder's own words of assignment.

> Question II. WHETHER THE COURT OF APPEALS' DECISION REVERSING THE TRIAL COURT'S JUDGMENT THAT THE AIR TERMINAL NOTE WAS NOT NEGOTIABLE AND FIRST FEDERAL WAS NOT A HOLDER IN DUE COURSE CONFLICTS WITH THIS COURT'S DECISION IN CALFO V. D.C. STEWART CO., ET AL., 30 UTAH ADV. REP. 8, 717 P.2d 697 (UTAH 1986), CONCERNING WHAT CONSTITUTES NOTICE TO AND KNOWLEDGE OF A POTENTIAL INFIRMITY TO A HOLDER SUCH AS FIRST FEDERAL UNDER THE CIRCUMSTANCES HEREIN?

This court stated in Calfo, cited above, at 717 P.2d 697, 700 that:

> . . . if the document evinces terms which should alert the transferee of possible defenses, then the transferee is not entitled to insulation from those apparent defenses.

The Court of Appeals wrongly interpreted the Calfo decision to mean that the Court of Appeals could ignore the accompanying Air Terminal purchase agreement regardless of the undisputed and critical fact that First Federal took the two documents as a security package pursuant to First Federal's own wording.

> Question III. WHETHER THE COURT OF APPEALS WRONGLY REVERSED THE TRIAL COURT (A) BY HOLDING THAT FIRST FEDERAL WAS A HOLDER IN DUE COURSE BECAUSE IT HAD NO NOTICE OF A CLAIM OR DEFENSE UNDER §70A-3-304(2) EVEN THOUGH GUMP & AYERS, A FIDUCIARY, RECEIVED $18,500 FROM THE $100,000 LOAN FIRST FEDERAL MADE TO GUMP & AYERS BECAUSE RECEIPT OF SUCH AMOUNT BY GUMP & AYERS WAS NOT A "BENEFIT" UNDER THE STATUTE, AND (B) BY WHOLLY FAILING TO CONSIDER ANOTHER PORTION OF §70A-3-304(2) UNDER WHICH FIRST

FEDERAL WAS ABSOLUTELY CHARGED WITH NOTICE OF A CLAIM WHEN GUMP & AYERS, A FIDUCIARY, ASSIGNED THE AIR TERMINAL NOTE AND ACCOMPANYING AGREEMENT TO FIRST FEDERAL AS SECURITY FOR GUMP & AYERS' OWN $100,000 DEBT?

Question IV. DID THE COURT OF APPEALS MISINTERPRET §70A-3-119(1) and §70A-3-304(1) IN HOLDING THAT FIRST FEDERAL WAS A HOLDER IN DUE COURSE EVEN THOUGH FIRST FEDERAL RECEIVED THE AIR TERMINAL NOTE AND AGREEMENT TOGETHER AND EVEN THOUGH THE AGREEMENT INDICATED THAT THERE WERE LIMITATIONS AND THAT AIR TERMINAL'S OBLIGATION WAS PARTLY OR WHOLLY VOIDABLE?

Even if the Air Terminal note were considered to be negotiable for the sake of argument, First Federal would not be a holder in due course. Section 70A-3-119(1) provides that a holder in due course is not affected by any limitation in the separate agreement "if he had no notice of the limitation when he took the instrument. . . ." (Emphasis added.) First Federal knew about the Morse problem prior to the assignment and then later at the time of assignment, First Federal knew that the purchase agreement specifically gave Air Terminal default rights and indemnified Air Terminal against the Morse problem. Because First Federal had notice of those limitations in the agreement, it cannot be a holder in due course under §70A-3-119(1).

First Federal also had notice of a claim or defense under §70A-3-304(1)(b) and (2) (Utah Code Ann. 1953) which provides that:

> (1) The purchaser has notice of a claim or defense if: . . .
>
> (b) the purchaser has notice that the obligation of any party is voidable in whole or in part, . . .

> (2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit . . . (Emphasis added.)

When First Federal made the $100,000 loan to Gump & Ayers, it knew that it was making a portion of the loan because of the Morse problem against which Air Terminal was clearly indemnified and for which Air Terminal had default rights. Because First Federal had actual knowledge and notice of the Morse problem and of Air Terminal's other rights, including indemnity contained in the purchase agreement at the time of the loan to Gump & Ayers, Air Terminal's rights to a set-off or default remedies were no longer merely potential or theoretical and Air Terminal's obligation was then known by First Federal to be voidable in whole or in part under subsection (b) above.

The Court of Appeals cites Sundsvallsbanken v. Fondmetal, Inc., et al., 624 F.Supp. 811, 816-18 (D. N.Y. 1985), as a case in which "the precise issue was addressed." The Court of Appeals' reliance on Sundsvallsbanken is misplaced because the court in that case specifically held that an earlier separate indemnity agreement was released by the maker upon execution of the subsequent renewal note sued upon (Note C) and that said agreement, even if it were established, had "no relationship to the obligation" under Note C which had been later executed at the request of the maker.

Section 70A-3-304(2) states that a purchaser has

knowledge of a claim if he has knowledge that a fiduciary has negotiated the instrument "as security for his own debt . . ." It is undisputed that Gump & Ayers, a fiduciary, and so known to First Federal, negotiated the Air Terminal note to First Federal as security for Gump & Ayers' own debt evidenced by Gump & Ayers' $100,000 note to First Federal. That fact alone precludes First Federal from being a holder in due course. The Court of Appeals' opinion does not discuss that provision of the above statute which appears to control the issue in this case.

In addition, there was no evidence that the $18,500 portion of the $100,000 note was to repay a debt owed to Gump & Ayers by Morse, the contractor on the Sunayers project, as the Court of Appeals concluded. Thus, the Court of Appeals' holding that Gump & Ayers received no direct "benefit" under the statute from the $18,500 is merely an unsupported and unwarranted conclusion. Moreover, §70A-3-304(2) does not differentiate between direct and indirect "benefit" to a fiduciary as the Court of Appeals does. It is submitted that the Court of Appeals' definition of "benefit" under the statute is too narrow because in this case it must be presumed that even if the entire $100,000 was used for the Sunayers project it clearly resulted in a substantial benefit to Gump & Ayers who was the general partner and owned at least sixty-five percent (65%) of Sunayers. (Purchase Agreement page 1). First Federal cannot be a holder in due course because it had abundant actual and statutory notice and knowledge of the problems.

CONCLUSION

The Court of Appeals wrongly ignored the accompanying purchase agreement in determining that the Air Terminal note was negotiable even though First Federal took the two documents as integral parts of the same package. In regard to the question whether First Federal was a holder in due course, it is undisputed that First Federal had abundant knowledge and notice of limitations and problems and at the very least knew that Gump & Ayers, a fiduciary, negotiated the Air Terminal note to First Federal as security for Gump & Ayers own $100,000 debt. It is submitted that the Court of Appeals wrongly interpreted the applicable statutes and the Califo decision, that this is an important case of first impression, and that Air Terminal's petition for a Writ of Certiorari should be granted.

Respectfully submitted this 27th day of April, 1989.

Walter P. Faber, Jr.

WALTER P. FABER, JR., Attorney
for Petitioner Air Terminal

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing to John W. Lowe, 50 West 300 South, Fourth Floor, Salt Lake City, UT 84101, postage prepaid, this 27th day of April, 1989.

Walter P. Faber, Jr.

APPENDIX

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examination, the manager continued to assert that Brown had one foot outside the store when stopped by the security officer. Similarly, the security officer testified Brown was out of the store when apprehended. The manager did not recall if Brown had said something to the effect that he was not outside the store, while the security officer thought such a statement might have been made. The manager also testified he saw Brown put the cigarettes in the grocery cart, exit the store, and ride his bike past the store twice, while looking in the store window. We find that the evidence was overwhelming as to Brown's intent to steal the cigarettes and are not convinced that it is reasonably likely that Brown's testimony would have produced an acquittal. Therefore, the error in denying the motion in limine was harmless.

Brown also claims the trial court erred by refusing to grant a new trial because a juror had allegedly lied during voir dire questioning and had made derogatory remarks about Brown prior to jury deliberations. In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the United States Supreme Court addressed the applicable test where a juror had allegedly failed to disclose information during voir dire questioning. The Court said,

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

464 U.S. at 556. In this case, the juror allegedly failed to disclose that he had had retail experience. However, Brown failed to prove that the juror actually had such experience and further failed to demonstrate that there would have been "a valid basis for challenge for cause."

In regard to the allegedly prejudicial remarks made by one juror, the trial court met with the jury after receiving a note from the jury. The trial court then further instructed the jurors on their responsibilities. After the jury rendered its verdict, the trial court polled each juror and asked whether the verdict was influenced by anything other than properly presented evidence and the court's instructions on the law. Each juror responded appropriately. Further, after the motion for a new trial was filed, the trial court found that the alleged statements of one juror were "ambiguous and subject to multiple interpretation" and that they did not constitute a predetermination of guilt nor direct prejudice against Brown. The trial court's decision on a motion for a new trial is largely within the court's discretion and will not be reversed on appeal unless there is a clear abuse of that discretion. *State v. Williams*, 712 P.2d 220, 222 (Utah 1985). We find no abuse of discretion in the trial court's refusal to grant a new trial because of improper juror actions.

Affirmed.

Pamela T. Greenwood, Judge

I CONCUR:
Judith M. Billings, Judge

I CONCUR IN THE RESULT:
Russell W. Bench, Judge

1. In *Wight*, we analyzed the facts under 609(a)(1) because the prior crime was punishable by imprisonment in excess of one year. *Id.* That section is no applicable in this case because the prior convictions are for misdemeanors.

Cite as
105 Utah Adv. Rep. 27

IN THE UTAH COURT OF APPEALS

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION of Salt Lake City,
Plaintiff and Appellant,
v.
Gump & Ayers Real Estate, Inc., and AIR TERMINAL GIFTS, INC.,
Defendants and Respondent.

No. 880331-CA
FILED: April 4, 1989

Third District, Salt Lake County
Honorable Pat B. Brian

ATTORNEYS:
John W. Lowe, Salt Lake City, for Appellant
Walter P. Faber, Jr., Salt Lake City, for Respondent

Before Judges Davidson, Billings, and Garff.

OPINION

BILLINGS, Judge:

First Federal Savings & Loan Association of Salt Lake City ("First Federal") brought suit against Air Terminal Gifts, Inc. ("Air Terminal") on a promissory note executed by Air Terminal and payable to Sunayers Limited Partnership ("Sunayers"). The Air Terminal note had been assigned to First Federal by Gump & Ayers Real Estate, Inc. ("Gump & Ayers"), the general partner of Sunayers. After an evidentiary hearing, the trial court found the note was not negotiable and First Federal was not a holder in due course. First Federal takes exception to both rulings, claiming it is entitled to enforce the note notwit-

hstanding any claims or defenses of Air Terminal. We agree, and reverse and remand this case for further proceedings consistent with our opinion.

FACTS

The facts are not in dispute. Sunayers was developing a condominium project in St. George, Utah called Sunflower. On June 5, 1984, Air Terminal invested $200,000 in the Sunayers Limited Partnership by paying $75,000 in cash and executing a $125,000 promissory note ("the Air Terminal note") secured by a Purchase and Security Agreement. The note provides: "This Note is secured by that certain Purchase and Security Agreement date June __, 1984. Reference is made to the Purchase and Security Agreement for additional rights of the holder hereof."

On June 27, 1984, Gump & Ayers, the general partner of Sunayers, executed a promissory note in the amount of $100,000 ("the Gump & Ayers note") payable to First Federal. Gump & Ayers assigned the Air Terminal note as further security for the loan to Sunayers. The proceeds from the Gump & Ayers note were to be used by Sunayers for debts incurred in developing the Sunflower project, one of which was described as the "Morse Shortfall." Morse was the contractor on the Sunflower project, and part of the Morse Shortfall was an $18,500 debt due Gump & Ayers.

Air Terminal claims the language in its note referring to the Purchase and Security Agreement for "additional rights of the holder hereof" makes the note non-negotiable. Air Terminal further claims that even if the note is negotiable, First Federal is not a holder in due course because it took the note with notice of claims made by and defenses of Air Terminal. Specifically, Air Terminal claims First Federal knew a portion of the proceeds from the loan would be used to pay Gump & Ayers as part of the Morse Shortfall. According to the Purchase and Security Agreement, Air Terminal was to be indemnified by Sunayers and Gump & Ayers from any obligations arising from the Morse Shortfall.

There are two issues on appeal. First, is the Air Terminal note a negotiable instrument? Second, is First Federal a holder in due course of the Air Terminal note?

Since our task is to interpret the language of the Air Terminal note to determine if it is negotiable, and on undisputed facts, determine if First Federal is a holder in due course, we accord the trial court's conclusions no deference but review for a correction of error. *See, e.g., Cornish Town v. Koller*, 758 P.2d 919, 921 (Utah 1988).

NEGOTIABILITY

The trial court held the Air Terminal note was not a negotiable instrument because the note referenced "additional rights" provided for in the Purchase and Security Agreement thereby creating additional powers and promises outside those provided in the note itself. We must decide whether the "reference" in the Air Terminal note to the Purchase and Security Agreement "for additional rights" creates an additional "promise" or "power" under controlling statutory language which renders the note non-negotiable.

When determining negotiability, only the instrument in question should be examined. *Calfo v. D.C. Stewart Co.*, 717 P.2d 697, 700 (Utah 1986). *See also First State Bank at Gallup v. Clark*, 91 N.M. 117, 570 P.2d 1144, 1146 (1977). In order for a writing to be a negotiable instrument, it must "contain an unconditional promise or order to pay a sum certain in money and *no other promise*, order, obligation or *power given by the maker* or drawer except as authorized by this chapter." Utah Code Ann. §70A-3-104(1)(a) (1988) (emphasis added). A promise or order, otherwise unconditional, does not become conditional simply because the instrument *"refers* to or states that it *arises out* of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration. ..." Utah Code Ann. §70A-3-105(1)(c) (1988) (emphasis added). In contrast, a promise or order is conditional if the instrument "states that it is *subject to or governed by* any other agreement." Utah Code Ann. §70A-3-105(2)(a) (1988) (emphasis added). Negotiability is not, however, affected by "a statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in the case of default on those obligations the holder may realize on or dispose of the collateral ...." Utah Code Ann. §70A-3-112(1)(b) (1988).

Thus, the issue is whether the Air Terminal note simply *refers* to or is *governed by* the Purchase and Security Agreement. The language of the relevant clause, providing that "reference is made to the Purchase and Security Agreement" persuades us that the note is negotiable under §70A-3-105(1)(c).

Cases from other jurisdictions interpreting similar provisions support our conclusion. *See, e.g., Third Nat'l Bank in Nashville v. Hardi-Gardens Supply of Illinois*, 380 F. Supp. 930, 938 (D. Tenn. 1974)(an obligation is not made conditional because the instrument refers to or states that it arises out of a separate agreement); *Federal Factors, Inc. v. Wellbanke*, 241 Ark. 44, 406 S.W.2d 712, 713 (1966)("The mere reference to the transaction giving rise to the instruments does not affect negotiability."); and 5 R. Anderson, *Uniform Commercial Code* §3-105:12 at 236 (3d ed. 1984)("The fact that a reference to collateral security for commercial paper may be ineptly worded does not impair negotiability when the sense of the provision is that something is

added rather than subtracted from the obligation of the commercial paper.")(citing *First Nat'l City Bank v. Valentine*, 62 Mis.2d 719, 309 N.Y.S.2d 563 (1970)).

Based on the foregoing, we conclude the Air Terminal note is a negotiable instrument.

HOLDER IN DUE COURSE

A holder in due course is "a holder who takes the instrument for value; and in good faith; and without notice that it is overdue or has been dishonored or of any *defense against* or claim to it on the part of any person." Utah Code Ann. §70A-3-302(1)(c) (1988) (emphasis added). Air Terminal claims First Federal is not a holder in due course of the Air Terminal note for two reasons. First, it claims First Federal had notice that Air Terminal's obligation was voidable in whole or in part under Utah Code Ann. §70A-3-304(1)(b) (1988). Second, Air Terminal claims First Federal had notice of a claim against the note under Utah Code Ann. §70A-3-304(2) (1988).

Section 70A-3-304(1)(b) states, with our emphasis, a "purchaser has notice of a claim or defense if ... the purchaser has notice that the obligation of any party is *voidable* in whole or in part, or that all parties have been discharged." Under the Purchase and Security Agreement, Air Terminal was to be indemnified for any reduction in capital or income based on claims against Sunayers due to the Morse Shortfall. Air Terminal claims that because First Federal had notice of this provision, a fact not in dispute, and the loan to Sunayers which involved the assignment of the Air Terminal note was to pay the Morse Shortfall, Air Terminal's obligation to pay was voidable, thus, First Federal is not a holder in due course.

In *Sundsvallsbanken v. Fondmetal*, Inc., 624 F. Supp. 811 (D. N.Y. 1985), this precise issue was addressed. The payee bank brought an action to collect on a renewal promissory note. An indemnity agreement executed in connection with the note, contained a provision by which the payee bank had a duty to indemnify the maker against certain claims. The New York District Court held that the duty to indemnify the makers from certain claims did not preclude collection on the note. In so holding, the court declared that any claim on the indemnity provision could be asserted as a counterclaim, but the provision did not permit the maker to "avoid" the note's obligation. *Id.* at 818. In support of its holding, the court stated, "[the]... inclusion of the word 'voidable' [in U.C.C. §3-304(1)(b)][1] is meant to restrict the provision to notice of a defense which will permit any party to avoid his original obligation on the instrument as distinguished from a setoff or counterclaim." *Id.* (referring to the Official Comments to the Uniform Commercial Code).

Similarly, the Purchase and Security Agreement gives Air Terminal the right to indemnification from Sunayers for any reduction in capital of the Sunayers Limited Partnership resulting from the Morse Shortfall, but it does not render Air Terminal's obligation on the note voidable under §70A-3-304(1)(b). Instead, Air Terminal's right to partial indemnification from Sunayers is independent of its obligation to pay on the Air Terminal note. Air Terminal may have a separate claim for indemnification against Sunayers or Gump & Ayers, but it cannot use this claim as a defense to its obligations to First Federal on the note.

Air Terminal also argues First Federal is not a holder in due course of the Air Terminal note under Utah Code Ann. §70A-3-304(2) which provides:

> "The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument... in any transactions for his own benefit or otherwise in breach of duty."

Specifically, Air Terminal claims Gump & Ayers, as general partner of Sunayers, negotiated the note and $18,500 of the $100,000 proceeds from the First Federal loan was paid by Sunayers to satisfy a previous debt owed to Gump & Ayers as part of the Morse Shortfall. Accordingly, Air Terminal asserts First Federal knew the loan was obtained for the "benefit" of Gump & Ayers, a fiduciary of Air Terminal, in contravention of §70A-3-304(2).

There is no question that Gump & Ayers, as general partner of Sunayers, was a fiduciary to Air Terminal and that proceeds of the loan were used to satisfy debts of the Sunayers development project for which Air Terminal had given its note. However, Air Terminal cites no authority for the proposition that these facts alone establish that its note was negotiated "for the benefit" of Gump & Ayers. Furthermore, the case law interpreting provisions identical to §70A-3-304(2) require a more substantial link to the fiduciary's personal interests than exists here. *See, e.g., Nashville City Bank and Trust Co. v. Massey*, 540 F. Supp. 566, 578 (D. Ga. 1982)("having made a *personal* loan to Mr. Thigpen and having permitted him as general partner-a fiduciary-to assign promissory notes which were payable to the limited partnership as security for his personal loan, the plaintiff bank, as a matter of law, took each of the promissory notes with 'notice of a claim against the instrument' and thus is not a holder in due course").

Unlike the facts in *Nashville City Bank*, the indirect benefit received by Gump & Ayers of having a bona fide debt, owed to it by Sunayers, repaid out of the proceeds of the loan is

not the type of "benefit" proscribed by §70A-3-304(2)

Air Terminal also asserts First Federal knew the note negotiated by Gump & Ayers was in breach of duty because First Federal knew the proceeds were to be used to satisfy the Morse Shortfall and that Air Terminal was to be indemnified from the Morse Shortfall under the Purchase and Security Agreement

As previously discussed, we consider Air Terminal's claim for indemnification against Gump & Ayers and Sunayers as a claim independent of its liability on the note Despite the indemnity provisions, Gump & Ayers had the right to assign Air Terminal's negotiable note for the benefit of Sunayers, and did not breach its fiduciary duty in doing so The assignment of the note does not vitiate Air Terminal's claim of indemnification against Gump & Ayers and Sunayers for funds expended to satisfy the Morse Shortfall In summary, we do not find §70A-3-304(2) defeats First Federal's status as a holder in due course

We hold that the Air Terminal note is a negotiable instrument and First Federal is a holder in due course The judgment of the trial court is, therefore, reversed, and the case is remanded for proceedings consistent with this opinion

Judith M Billings, Judge

WE CONCUR
Regnal W Garff, Judge
Richard C Davidson, Judge

1 Utah Code Ann §70A-3-304(1)(b) the provision at issue in this case, is identical to §3 304(1)(b) of the Uniform Commercial Code referred to by the court in *Sundsvallsbanken*

Cite as
105 Utah Adv. Rep. 30

IN THE UTAH COURT OF APPEALS

Jack C. DANIELS,
Third-Party Plaintiff and Appellant,
v.
DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, A-One Construction, Inc., Miller Brick Sales, Eugene E. Doms, and Michael R. McCoy,
Respondent.

CEN Corporation,
Plaintiff,
v.
Jack C. Daniels, Debra Estes, Scott Berry, Debra Ann Sitzberger, and Amy Stanton Eagleson,
Defendants.

No. 880135-CA
FILED: April 5, 1989

Third District, Summit County
Honorable Philip R Fishler

ATTORNEYS

Gordon A Madsen, Murray, and Robert C Cummings, Salt Lake City, for Appellant

David R Olsen, Carl F Huefner, and Charles P Sampson, Salt Lake City, for Respondent

Before Judges Davidson, Garff, and Jackson

OPINION

DAVIDSON, Judge:

Jack C Daniels appeals from a summary judgment in favor of Deseret Federal Savings & Loan Association, dismissing his notice to hold and claim a lien on property for which he was both a co-owner and the general contractor Daniels' claim concerned the timeliness of filing his notice and the profits owed to him as a limited partner in Park Avenue Development Company ("Park Avenue") The trial court held that his lien was both untimely and invalid We affirm

FACTS

In 1980, Daniels invested approximately $28,000 in the development of an eight-unit condominium project in Park City, Utah thereby acquiring an interest through a limited partnership in Park Avenue The agreement between Park Avenue and Daniels provided that Daniels would receive approximately $80,000 for his share in the profits from the sale of the condominiums and for overhead Park Avenue also hired Daniels to serve as the general contractor for the condominium project and agreed to pay him approximately $15,000 for his services

On August 14, 1980, Deseret approved a construction loan to Park Avenue and construction on the project commenced By the end of July 1981, Daniels had completed all of the construction required pursuant to the construction contract and Park City issued certificates of final inspection and occupancy for the project Daniels was paid $15,000 for services and labor, but was not paid his promised share of the profits from the sale of the condominiums

Apparently, Daniels intended to file a notice to hold and claim a lien on the project, for the $80,000 "profit," within the statutory period required for filing However, the owners of the project were trying to obtain refinancing and they requested Daniels not to file his mechanic's lien for the profit and overhead In return, the owners promised Daniels that they would allocate his share of the profits to

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B

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE

COUNTY OF SALT LAKE, STATE OF UTAH

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SALT LAKE CITY, Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC. and AIR TERMINAL GIFTS, INC., Defendants.	FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW IN REGARD TO SEVERED ISSUES OF NEGOTIABILITY AND HOLDER IN DUE COURSE STATUS BETWEEN PLAINTIFF AND DEFENDANT AIR TERMINAL GIFTS, INC.
AIR TERMINAL GIFTS, INC., Crossclaimant, vs. SUNAYERS LIMITED PARTNERSHIP, VICTOR R. AYERS, MICHAEL A. SASS, JERRY W. FLOOR, GRANT THORNTON, a partnership, MARY KAY GRIFFIN, and JOHN DOES I-III, inclusive, Crossclaim Defendants.	Civil No. C86-1224 JUDGE PAT B. BRIAN
JERRY W. FLOOR, Crossclaimant and Third-Party Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC., n/k/a V & A, INC., SUNAYERS LIMITED PARTNERSHIP, and VICTOR R. AYERS, Crossclaim Defendants, -and-	

MARJORIE B. GUMP, MARION P. AYERS, FOX & COMPANY, MARY KAY GRIFFIN, SUITTER AXLAND ARMSTRONG & HANSON, and CHARLES R. BROWN,

Third-Party Defendants,

SUNAYERS LIMITED PARTNERSHIP, VICTOR R. AYERS, MARION P. AYERS, MARJORIE B. GUMP, and GUMP & AYERS REAL ESTATE, INC. n/k/a V & A, INC.,

Fourth-Party Plaintiffs,

vs.

GRANT THORNTON, a partnership,

Fourth-Party Defendant.

The separate trial of the first and severed phase of the above case between plaintiff First Federal and defendant Air Terminal Gifts, Inc., concerning the principal issues whether the promissory note signed by Air Terminal was a negotiable instrument and whether First Federal was a holder in due course thereof, regular came on for non-jury trial before the above-entitled court on the 30th day of December, 1987, pursuant to the prior determination by the Court that there was no just reason to delay the trial of and entry of judgment as to such issues, the Honorable Pat B. Brian presiding, First Federal being represented by its counsel John W. Lowe, Air Terminal being represented by its counsel, Walter P. Faber, Jr., and no other parties appearing or being represented, and the parties having previously filed extensive written memoranda

iscussing the facts and legal issues and having introduced evidence, aving rested and then presented final oral arguments, and the ourt having considered the evidence, statutes, legal authorities n.. arguments, and being fully advised in the premises, and after caring objections to the court's proposed findings and conclusions, nd after due deliberation, makes the following:

FINDINGS OF FACT

1. On June 5, 1984 Air Terminal agreed to invest $200,000 n and become a limited partner in the Sunayers Limited Partnership of which Gump & Ayers was the general partner.

2. On that date Air Terminal paid $75,000 in cash and executed a thirteen page Purchase and Security Agreement ("purchase greement") and a contemporaneous and integrated companion promissory ote payable in three installments in the total principal amount of $125,000 plus interest.

3. At the time the purchase agreement and note were signed representatives of Gump & Ayers told Air Terminal that the purchase greement and note were companion parts of the same transaction and protected Air Terminal from separate suit on the note.

4. The purchase agreement specifically incorporates the note and contains a number of additional rights of and limitations on the parties.

5. A provision in the purchase agreement indemnifies Air Terminal against any claim involving Morse, the prior contractor on the Sunayers' project.

6. The note contains the following statement on its face just above the signature line:

> Reference is made to the Purchase and Security Agreement for additional rights of the holder hereof.

7. The purchase agreement and note were executed at the same time as companion parts of a contemporaneous, integrated, package transaction.

8. Thereafter, on June 27, 1984, Gump & Ayers, the general partner of Sunayers, borrowed $100,000 from First Federal principally in connection with the Sunayers' project and signed a promissory note for that amount, which Gump & Ayers' note was due on December 15, 1984.

9. Gump & Ayers told First Federal prior to the $100,000 loan that a major portion of the loan was to pay for a previous shortfall caused by Morse, the prior contractor on the Sunayers' project.

10. A portion of the $100,000 loan amount requested to cover the Morse shortfall was allocated directly to Gump & Ayers.

11. On June 27, 1984 in connection with the $100,000 loan Gump & Ayers assigned the Air Terminal purchase agreement and note as a package to First Federal who was the author of and typed on the bottom of the Air Terminal note the following words of assignment:

> Sunayers hereby assigns, with recourse, all of its right, title and interest in the above promissory note and the agreement securing it to First Federal Savings and Loan Assn. of Salt Lake City,
>
> Sunayers Limited Partnership
> By Gump and Ayers
> Real Estate, Inc.
> Its General Partner

12. The Gump & Ayers' note for $100,000 dated June 27, 1984 was prepared by First Federal and links together the Air Terminal note and purchase agreement by the following statement which is typed on the bottom of the Gump & Ayers' note:

> The indebtedness evidenced by this note is secured by a Promissory Note dated June 5, 1984 and a Security Agreement of even date.

13. First Federal did not notify Air Terminal of the assignment and so Air Terminal paid the December 1, 1984 principal installment on the Air Terminal note of $41,666.67 plus interest to Gump & Ayers. Air Terminal was given credit for its payment.

14. On December 15, 1984 Gump & Ayers executed a second promissory note to First Federal for $85,221.31 which note renewed the first Gump & Ayers' note of $100,000 dated June 27, 1984. This second Gump & Ayers' note contained the identical statement as had the first Gump & Ayers' note that the Air Terminal note and purchase agreement were security therefor.

15. In the spring of 1985 Air Terminal discovered that some of the representations originally made to induce Air Terminal to invest in Sunayers were untrue. Consequently, Air Terminal refused to make the second installment payment on the Air Terminal note which payment was due on June 1, 1985.

16. On June 13, 1985 after the Air Terminal note was in default, Gump & Ayers executed a third promissory note for $85,221.31 to First Federal, which third note renewed the second Gump & Ayers' note for $85,221.31 dated December 15, 1984. The

third Gump & Ayers' note also contained the same identical security statement as had the first two Gump & Ayers' notes.

17. First Federal first notified Air Terminal in August, 1985 that the Air Terminal note had been assigned to First Federal and requested that payment of the past due second installment be made to First Federal.

18. When Air Terminal refused to make further payments on the note, First Federal commenced action against Gump & Ayers on its note and against Air Terminal on its note.

19. Air Terminal answered that its note was not negotiable that First Federal was not a holder in due course thereof, and that First Federal was subject to all defenses Air Terminal could assert against Gump & Ayers and Sunayers.

20. The court previously granted summary judgment in favor of First Federal and against Gump & Ayers on its note dated June 13, 1985.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the issues.

2. The Air Terminal purchase agreement and note were executed at the same time as part of a single package and were intended by Gump & Ayers and Air Terminal to be companion parts of an integrated transaction and were not to be considered separately

3. By its wording, the Air Terminal note incorporates the additional rights of the holder contained in the purchase agreement.

4. The rights of the holder contained in the purchase agreement are in addition to and exceed the statutory rights of prepayment and acceleration.

5. The Air Terminal purchase agreement and note were contemporaneously assigned as a package to First Federal who treated them together as a single integrated transaction from the time of the assignment to First Federal.

6. Because it contains other rights granted by Air Terminal, the Air Terminal note is not a negotiable instrument.

7. First Federal knew and was given notice of the Morse shortfall prior to making the $100,000 loan to Gump & Ayers.

8. First Federal had notice of the rights and limitations contained in the purchase agreement and knew that Gump & Ayers was a fiduciary at the time of the assignment to First Federal of the Air Terminal note.

9. Gump & Ayers assigned the Air Terminal note to First Federal as security for Gump & Ayers' own debt and for Gump & Ayers' own benefit as well as to obtain funds for Sunayers.

10. First Federal was a purchaser of the Air Terminal note from Gump & Ayers, had notice of a claim and limitations and is not a holder in due course of the note.

11. First Federal is subject to the defenses Air Terminal is entitled to assert against Gump & Ayers and Sunayers.

12. There is no just reason to delay judgment of the issues concerning negotiability and holder in due course, and therefore the court expressly determines that judgment be entered in favor of defendant Air Terminal and against plaintiff First Federal on those issues.

DATED this 5th day of February, 1988.

BY THE COURT:

/s/ Pat B. Brian
PAT B. BRIAN, District Judge

CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing John W. Lowe, 50 West Broadway, #400, Salt Lake City, UT, and hereby certify that I mailed a copy of the foregoing to the followir

THOMAS N. CROWTHER
455 South 300 East, #300
Salt Lake City, UT 84111

MICHAEL A. SASS, Pro Se
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DEREK LANGTON
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Because the impoundment and search were admittedly a pretext concealing an investigatory police motive, the evidence seized was improperly admitted at trial under the fourth amendment of the United States Constitution. 711 P.2d at 270. We again note that neither party has discussed or applied article I, section 14 of the Utah State Constitution to the facts of the instant case, and therefore, we do not here consider any separate state standards. *See State v. Earl, supra.*

Defendant's convictions of possession and possession with the intent to distribute controlled substances are reversed and remanded.

elo CALFO, Plaintiff and Respondent,

v.

).C. STEWART CO., Clara J. DeGraff, dba C.J. Realty and Roland Vance, Defendants and Appellants.

No. 19309.

Supreme Court of Utah.

March 28, 1986.

Holder brought action against promisr, realtor and realtor's agent, as guaranr, upon promissory note issued by promsor to realtor and sold to holder by realr's agent. The Third District Court, Salt ake County, David B. Dee, J., entered ir ary judgment for holder and granted omissor indemnity against realtor and retor's agent, and upon promissor's motion strike, entered order eliminating interest d stating that summary judgment was roperly signed and entered and in full ree and effect, and promissor appealed om such order. The Supreme Court, Zimerman, J., held that: (1) time for taking appeal did not begin to run until entry of order stating that summary judgment was properly signed and entered, and (2) promissory note stating that note was due in full upon final closing between promissor and buyers, which would be on or before certain date, when buyers would exercise their option to purchase motel, was not negotiable instrument.

Reversed and remanded with directions.

1. Appeal and Error ⇐347(2)

Time for taking appeal from judgment did not begin to run until entry of order stating that previous summary judgment was properly signed and entered and in full force and effect, where form of prior summary judgment had not been served upon defendant prior to submission to trial court, as required by local rule. Rules Civ.Proc., Rule 58A(c); Rule 73(a) (Repealed).

2. Bills and Notes ⇐144

To be negotiable under Uniform Commercial Code, instrument must evidence signature by maker or drawer, contain unconditional promise or order to pay sum certain in money, be payable on demand or at definite time and be payable to order or to bearer. U.C.C. § 3-104(1); U.C.A.1953, 70A-3-104.

3. Bills and Notes ⇐144

To qualify as negotiable instrument under Uniform Commercial Code, promise to pay and certainty of payment must be unequivocal. U.C.C. § 3-104(1); U.C.A. 1953, 70A-3-104.

4. Bills and Notes ⇐144

Instrument's negotiability must be determinable from what appears on face of instrument, without reference to extrinsic facts. U.C.C. §§ 3-104(1), 3-105 comment; U.C.A.1953, 70A-3-104.

5. Bills and Notes ⇐144

Purpose of requirement that instrument's negotiability be determinable from what appears on face of instrument is to

protect transferees from latent defenses to payment. U.C.C. § 3-104(1).

6. Bills and Notes ⇐342

Transferee is not entitled to insulation from apparent defenses where negotiable instrument evinces terms which should alert transferee of possible defenses. U.C.C. §§ 3-104(1), 3-105 comment; U.C.A. 1953, 70A-3-104.

7. Bills and Notes ⇐164

Promissory note issued by seller to realtor, stating that note was due in full upon final closing between seller and buyers, which would be on or before certain date, when buyers would exercise option to purchase motel, was conditional and indefinite on its face, and thus, was not negotiable instrument. U.C.C. § 3-104(1); U.C.A.1953, 70A-3-104.

8. Bills and Notes ⇐452(1), 452(3)

*Promissor's defenses of lack of consid*eration, nonmaturity of note, and failure of condition precedent were absolute in holder's action upon promissory note, issued by promissor to realtor and sold to holder by agent of realtor, stating that note was due in full upon final closing between promissor and buyers, which would be on or before certain date, when buyers would exercise their option to purchase motel, where sale of motel did not occur. U.C.C. §§ 3-104(1), 3-302(1); U.C.A.1953, 70A-3-104.

Michael R. Carlston, Salt Lake City, for defendants and appellants.

Joseph H. Gallegos, Michael R. Sciumbato, Salt Lake City, for plaintiff and respondent.

ZIMMERMAN, Justice:

This case involves a suit by plaintiff Angelo Calfo upon a promissory note issued by defendant D.C. Stewart Co. ("Stewart"). The note was payable to the order of C.J. Realty and was sold to Calfo by an agent of C.J. Realty. The trial court granted Calfo a summary judgment enforcing the note. Stewart appealed. We hold that the note was not a negotiable instrument and *reverse the trial court on that ground.*

Stewart owned the Astro Motel in Cedar City, Utah. Defendant Roland Vance, a real estate agent for defendant C.J. Realty, approached Stewart about listing the motel for sale with C.J. Realty. The listing agreement was entered into, and Vance subsequently obtained a potential buyer for the motel.

On September 24, 1979, Stewart and the potential buyer entered into a lease agreement and option to purchase. The agreement provided that the lessees could exercise an option to purchase the motel on or before May 1, 1980. Also on September 24, 1979, Stewart executed a promissory note for $15,900 payable to C.J. Realty to secure the real estate commission to which C.J. Realty would be entitled if the lessees exercised their option to purchase. The promissory note provided that it would be payable as follows:

> Total due in full upon final closing between D.C. Stewart Co., Seller, and Wendell James Downward and Connie Downward, husband and wife, Buyers, which shall be on or before May 1, 1980, when Buyers exercise their option to purchase the Astro Motel in Cedar City, Utah.

On September 27, 1979, the promissory note was sold by Vance, acting on behalf of C.J. Realty, to the plaintiff Calfo for $12,720.

The lessees never exercised their option to purchase the Astro Motel. However, after May 1, 1980, Calfo made demand upon all of the defendants for payment of the note. When payment was not forthcoming, suit was brought on the note against Stewart, and against Vance as guarantor of the note. Stewart then crossclaimed against his co-defendants for indemnity.

On January 5, 1982, the trial court heard Calfo's motion for summary judgment. Calfo argued that the promissory note was a negotiable instrument on its face, that it was past due, and that he was a holder in due course. On that same date, the court

also heard Stewart's motion for a summary judgment. Stewart asserted that the note was not a negotiable instrument and that Calfo was not a holder in due course. In addition, Stewart's counsel represented that if a judgment was granted against Stewart, counsel for Stewart's co-defendants had consented to entry of judgment on Stewart's cross-claim for any amounts it was required to pay Calfo. The trial court orally granted Calfo's motion. In so doing, it found the note to be "a good note." The court denied Stewart's motion against Calfo, but allowed Stewart indemnity against its co-defendants.

[1] On January 14, 1982, the trial court executed a document entitled "Summary Judgment" which awarded Calfo the principal amount of the note $15,900, plus interest at six percent per annum from the due date, and attorney fees of $2,700. Stewart first became aware of this document in May of 1982, when Calfo attempted to collect upon it by instituting supplemental proceedings. Stewart's counsel complained to Calfo's counsel that the form of judgment had not been served upon him prior to its submission to the trial court, as required by Rule 2.9(b) of the District and Circuit Court Rules of Practice for the State of Utah. Efforts to have Calfo's counsel voluntarily withdraw the summary judgment failed. Stewart then moved the trial court to strike the judgment, arguing that the judgment improperly allowed interest and that it had not been submitted to opposing counsel for approval prior to submission to the court.

After a series of hearings on Stewart's motion to strike, the trial court executed an order on June 7, 1983, stating that "the summary judgment entered by the court on January 14, 1982 ... was properly signed and entered by the court on said date and is in full force and effect...." However, the court's June 7th order did modify the earlier order by deleting the award of interest.

Stewart appeals from the order of June 7, 1983. Calfo objects to the timeliness of the appeal, arguing that the June 7th order merely confirmed the judgment entered on January 14, 1982, albeit as redrawn to eliminate interest; therefore, the time to appeal expired one month after January 14, 1982, not one month after June 7, 1983. Rule 73(a), Utah R.Civ.P.[1]

The appeal was timely taken. We have previously held that unless Rule 2.9(b) of the District and Circuit Court Rules of Practice has been complied with, the judgment in question is not deemed "filed" within the meaning of Rule 58A(c) of the Utah Rules of Civil Procedure and the time for taking an appeal from that judgment under Rule 73(a) [now Rule 4(a) of the Rules of Appellate Procedure] does not begin to run because the judgment has not been properly "entered." *Bigelow v. Ingersoll*, Utah, 618 P.2d 50, 52 (1980); *Larsen v. Larsen*, Utah, 674 P.2d 116, 117 (1983); *Wayne Garff Construction Co., Inc. v. Richards*, Utah, 706 P.2d 1065, 1066 (1985). Because Rule 2.9(b) was not complied with here, there was no judgment from which an appeal could be taken until June 7, 1983. Stewart's appeal from the order entered on that date is timely.

[2] Reaching the merits, Stewart argues that trial court erred in finding the promissory note to be a negotiable instrument. To be negotiable under section 3-104(1) of the Uniform Commercial Code, U.C.A., 1953, § 70A-3-104 (Repl.Vol. 7B, 1980), an instrument must meet four criteria. Specifically, it must (i) evidence a signature by the maker or drawer, (ii) contain an unconditional promise or order to pay a sum certain in money, (iii) be payable on demand or at a definite time, and (iv) be payable to order or to bearer. Stewart and Calfo agree that the promissory note in question satisfies the first and fourth of

1. Rule 73(a) was superseded on January 1, 1985, by Rule 4(a) of the Rules of Appellate Procedure. All relevant developments in this case occurred under Rule 73(a), although the holding of this case with respect to when a judgment is "filed" is equally applicable under the new Rule 4(a).

these requirements. They disagree as to whether second and third are met.

[3] Although the second and third requirements of negotiability are separately stated, in fact they are closely related. Both focus on whether the instrument is a clear and unconditional promise to pay. These concerns are central to the whole concept of negotiable instruments and that should be kept in mind in determining whether a document is entitled to be treated as a negotiable instrument under the Uniform Commercial Code. Two important functions of negotiable instruments are "to supplement the supply of currency" and to provide a present representation of "future payment of money." 1 W. Hawkland, *A Transactional Guide to the Uniform Commercial Code* § 2.0304, at 459 (1964).

> These currency and credit functions would be defeated by conditional promises, because the costly and time consuming investigations that would be required by such promises would impede circulation. Conditional paper would increase the risks of the holder, and discount rates would be increased commensurately. Substitutes for money must be capable of rapid circulation at minimum risks, and credit documents are feasible only when low discounting prevails. Obviously, then, negotiable instruments must be unconditional to serve the purposes for which they are created.

Id. Because a negotiable instrument is a substitute for money or currency, both the promise to pay and the certainty of payment must be unequivocal.

[4–6] For similar reasons, an instrument's negotiability must be determinable from what appears on its face and without reference to extrinsic facts. *See Participating Parts Associates, Inc. v. Pylant*, Ala.Civ.App., 460 So.2d 1299, 1301 (1984); *Holsonback v. First State Bank*, Ala.Civ.App., 394 So.2d 381, 383 (1980), *cert. denied*, Ala., 394 So.2d 384 (1981). *See also Official Comments to U.C.C.* § 3–105. This requirement protects transferees from latent defenses to payment, *i.e.*, those defenses which are not readily apparent from the document. 5 Anderson, *Uniform Commercial Code* § 3–104:4 (3d ed. 1984) (relying upon *First State Bank v. Clark*, 91 N.M. 117, 570 P.2d 1144, 22 U.C.C. Rep. § 1186 (1977)). On the other hand, if the document evinces terms which should alert the transferee of possible defenses, then the transferee is not entitled to insulation from those apparent defenses.

> The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability, or changes of terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of notes and instruments requires that a transferee be able to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language in the note itself.

First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144, 1147 (1977).

[7] The present case involves a promissory note which is "due in full upon final closing between ... seller and ... buyers, which shall be on or before May 1, 1980, when buyers exercise their option to purchase the Astro Motel...." In determining whether this promise to pay is conditional or indefinite, we are not aided by the trial court's summary finding that this is a "good note." The document specifically states that it is due only upon final closing "when buyers exercise their option to purchase." This language clearly places the holder on notice that the note will become due only upon a contingency which the holder cannot control, *i.e.*, the exercise by buyers of their option to purchase. As for definiteness, the date set forth, May 1, 1980, merely defines when the option to purchase expires and does not establish a time as to when the note will certainly become due. On these facts, we find the note to be both conditional and indefinite on its face.

Calfo relies upon the case of *Northwestern National Bank of Minneapolis v. Shuster*, Minn., 307 N.W.2d 767 (1981), in support of his argument that language in the promissory note does not make the obligation to pay conditional. We find this unpersuasive. In *Shuster*, the promissory note contained language that "[t]his is promised payment for ownership in Casper project [when] option is exercised for 2nd half." *Id.* at 770. The *Shuster* court found that this reference to an option did not create a conditional promise to pay. However, it ultimately held that the quoted language prevented the holder from being a "holder in due course" under section 3-302(1) of the Uniform Commercial Code because it placed the holder on notice as to a defense against payment based upon failure of a condition precedent if the option there was not exercised. *Id.* at 771. The holdings in *Shuster*—that the note is unconditional but that it gave the holder notice of defenses—appear to be inconsistent. The better reasoning would be that the note was conditional and therefore non-negotiable. *See, e.g., Participating Parts Associates, Inc. v. Pylant*, Ala., 460 So.2d 1299, 1301-02 (1984).

[8] For the reasons stated, we hold that the promissory note sued upon is not a negotiable instrument and that judgment was improperly entered against Stewart. There appears to be no dispute in the record that the sale of the Astro Motel did not occur. Stewart's defenses of lack of consideration, non-maturity of the note, and failure of condition precedent seem to be absolute. We therefore remand the case for entry of a judgment in favor of Stewart on its motion for summary judgment, and for such further proceedings against the other defendants as are appropriate under the pleadings, and as are consistent with this opinion. Consistent with Rule 33(a), Utah R.App.P., costs are awarded to appellant.

HALL, C.J., and STEWART, HOWE, and DURHAM, JJ., concur.

In re DISCIPLINARY ACTION OF George McCUNE.

No. 20140.

Supreme Court of Utah.

March 31, 1986.

Disciplinary proceeding was instituted. The Supreme Court, Stewart, J., held that counsel, who retained out-of-state attorney to represent client and engaged court reporter to transcribe depositions in a case, was subject to disciplinary sanctions, including reimbursement as condition to reinstatement, for failure to pay for the reporter's and other counsel's services, where those amounts were billed to the clients, who paid counsel.

Suspension ordered.

Howe, J., filed concurring statement, in which Zimmerman, J., joined.

1. Attorney and Client ⇐52

Counsel's failure to answer formal complaint issued by ethics and discipline committee panel constituted an admission of charges that he had failed to pay out-of-state attorney whom he had engaged to represent client and certified court reporter which had been engaged to transcribe depositions in one of counsel's cases.

2. Attorney and Client ⇐36(1)

Supreme Court's power to regulate practice of law necessarily includes the power to discipline a lawyer. Const. Art. 8, §§ 1 et seq., 4.

3. Attorney and Client ⇐36(1)

Legislature's power to regulate and control attorneys in certain aspects is subject to Supreme Court's inherent power to discipline its officers. Const. Art. 8, §§ 1

PURCHASE AND SECURITY AGREEMENT

THIS AGREEMENT is made and entered into this 5 day of June, 1984, by, between and among SUNAYERS LIMITED PARTNERSHIP, a Utah limited partnership (the "Seller"), AIR TERMINAL GIFTS, INC., a Utah corporation (the "Purchaser"), and GUMP & AYERS REAL ESTATE, INC., a Utah corporation (the "General Partner");

W I T N E S S E T H:

WHEREAS, Seller is a limited partnership formed under the laws of the State of Utah on September 2, 1983; and

WHEREAS, Victor R. Ayers initially acted as general partner for the Seller, and as general partner had an 80% interest in the Seller's capital, net profits, net losses and cash available for distribution, and as a limited partner, Victor R. Ayers had an additional 10% partnership interest, all of which interests have been assigned to the General Partner, and the General Partner acts as General Partner for the Seller; and

WHEREAS, there are two additional limited partners, Wayne L. Morse, who has a 5% limited partnership interest in Seller and Michael A. Sass, who has a 5% limited partnership interest in seller; and

WHEREAS, the Seller desires to sell and the Purchaser desires to acquire an interest in the Seller representing a 25% interest as a limited partner in the capital, net profits, net losses and cash available for distribution of the Seller for the purchase price of $200,000; and

WHEREAS, in the interest of effecting an infusion of cash into the Seller, the General Partner agrees that the share of the Purchaser shall reduce the interest of the General Partner in the Seller, and shall have no effect on the interest of the other limited partners;

NOW, THEREFORE, in consideration of the mutual covenants, promises, representations and warranties contained herein, the parties hereto hereby agree as follows:

1. Purchase and Sale of Partnership Interest. Subject to and upon the terms and conditions of this Agreement, the Seller hereby sells, conveys, assigns, transfers, and sets over unto the Purchaser and the Purchaser hereby accepts from the Seller an undivided limited partnership interest in the Seller,

comprising a 25% interest in the capital, net profits, net losses and cash available for distribution or such other interest as the parties may agree to in writing, together with all of the rights of a limited partner under that certain Certificate and Agreement of Limited Partnership for Sunayers Limited Partnership dated September 2, 1983 and which otherwise are appurtenant to the status of limited partner under Utah law (the "Partnership Interest").

2. Price. The Purchase Price for the Partnership Interest shall be the sum of $200,000 (the "Purchase Price"). The Purchaser delivers to the Seller concurrently with the execution hereof cash, cashier's check(s) or certified funds representing the amount of $75,000, together with the Purchaser's promissory note in the amount of $125,000 in the form attached hereto as Exhibit "A" and incorporated herein by this reference (the "Promissory Note").

3. Documents Delivered Concurrently with the execution hereof, the Purchaser shall provide the Seller with (1) a UCC-1 form of Financing Statement for filing in the Lieutenant Governor's office of the State of Utah with respect to the security interest of the Seller in the Partnership Interest, and (2) the Promissory Note, duly executed by the Purchaser.

4. Grant of Security Interest. The Purchaser hereby grants to the Seller a Security Interest in and to the Partnership Interest to secure the timely payment of all principal, interest and other amounts due or to become due under the Promissory Note.

5. Term of Security Interest. This Agreement shall be terminated only by the filing of a Termination Statement in accordance with the applicable provisions of the Uniform Commercial Code as in effect in the State of Utah (the "Code"), which shall be filed when the Promissory Note has been paid in full. Until terminated, the Security Interest hereby created shall continue in full force and effect and shall secure and be applicable to all amounts owing under the Promissory Note.

6. Covenants. The Purchaser will do all acts and things, and will execute all writings requested by the Seller to establish, maintain and continue a perfected first security interest of the Seller in the Partnership Interest as a perfected and first security interest under the Code and will promptly on demand pay all costs and expense of filing and recording, including the costs of any searches deemed necessary by the Seller to establish and/or determine the validity and/or the priority of the Seller's security interest, and the Purchaser will pay all

taxes and other claims of charges which in the opinion of the Seller might prejudice, impair, or otherwise affect the Partnership Interest.

7. Protection of Security. After 30 days written notice and demand upon the Purchaser, the Seller may make such payments and do such acts as the Seller may deem necessary to protect the Security Interest including, without limitation, paying, purchasing, contesting or compromising any encumbrance, charge or lien which is or may be prior to or superior to the security interest granted hereunder, and in exercising any such powers or authority to add all expenses incurred in connection therewith to the obligations secured hereby (it being understood and agreed that, after taking such action, the Seller shall notify the Purchaser thereof in writing).

8. Events of Default. The occurence of any of the following events shall constitute an event of default ("Event of Default") hereunder:

a Any failure or neglect to comply with any of the terms, provisions, warranties, or covenants of this Agreement; or

b. Any failure to pay any amount due under the Promissory Note when due, or such portions thereof as may be due, by acceleration or otherwise; or

c. The falsehood of any warranty, representation or other information made, given or furnished to the Seller by or on behalf of the Purchaser with respect to the substance hereof, whether such warranty, representation or other information is false when made, given or furnished, or becomes false through the passage of time or the occurrence of any event subsequent hereto; or

d. The issuance or filing of any attachment levy, garnishment, or other judicial process of or upon the Purchaser or the Partnership Interest; or

e. Any sale or other disposition by the Purchaser in the ordinary course of business, or death, dissolution, termination of existence, insolvency, business failure, or assignment for the benefit of creditors of the Puchaser or commencement of any proceedings under any State or Federal bankruptcy or insolvency laws or laws for the release of debtors by the release of Purchaser, or the appointment of a receiver, trustee,

court appointee, or otherwise for all or any part of the property of the Purchaser.

9. Remedies.

a. Upon the occurrence of any Event of Default the Seller may, at it's discretion and without prior notice to the Purchaser in the event of failure to make any payments under the Promissory Note, or after 15 days written notice as to any other Events of Default, declare all or any portion of the Promissory Note to be immediately due and payable, and shall have and exercise any one or more of the rights and remedies given to a secured party under the Code, including without limitation the right to sell or otherwise dispose of any or all of the Partnership Interest, except that portion which bears the same proportion to the entire Partnership Interest as the portion of the Purchase Price paid by the Seller bears to the total Purchase Price, and to offset against the Promissory Note the amount owing by the Seller to the Purchaser.

b. The proceeds of any sale or other disposition of the Partnership Interest authorized by this Agreement shall be applied by the Seller first upon all expenses authorized by the Code and then upon all reasonable attorneys' fees and legal expenses incurred by the Seller; the balance of the proceeds of such sale or other disposition shall be applied in the payment of the Promissory Note, first to interest, then to principal, and the surplus, if any, shall be paid over to the Purchaser or to such other persons as may be entitled thereto under applicable law. The purchaser shall remain liable for any deficiency which it shall pay to the Seller immediately upon demand.

c. Seller may, upon the occurrence of any default, declare a forfeiture of all or any portion of the Partnership Interest except that portion which bears the same proportion to the entire Partnership Interest as the portion of the Purchase Price paid by the Seller bears to the total Purchase Price, and reduce the interest of the Purchaser in the Seller to such extent for any and all purposes, in lieu of any other remedy hereunder.

d. Nothing herein contained is intended, nor should it be construed to preclude the Seller from pursuing any other remedy provided by law for the collection of the Promissory Note or any portion

thereof, or for the recovery of any others from which the Seller may be or become entitled for the breach of this Agreement by the Purchaser.

10. Distributions. In the event that at any time or from time to time after the date hereof, the Purchaser shall receive or shall become entitled to receive any distribution of any nature whatsoever, whether in property or any other assets, or the Purchaser shall receive or be entitled to receive securities, property or other assets in the case of any reorganization, consolidation, merger, or incorporation, then and in each such case, the Purchaser shall deliver to the Seller, and the Seller shall be entitled to receive and retain all such securities, property, or assets as an addition to the Partnership Interest as collateral for the payment of the Promissory Note.

11. Indemnification of Purchaser Against Liabilities of Seller. Except to the extent of Purchaser's investment in Seller, including that portion of the Purchase Price actually paid and any interest thereon actually paid pursuant to the Promissory Note and/or this Agreement, the Seller and the General Partner will indemnify and hold the Purchaser harmless from and against any and all losses, claims, damages, expenses or liabilities joint or several, to which the Purchaser may become subject, and, except as hereinafter provided, will reimburse the Purchaser for any legal or other expenses reasonably incurred by it in connection with investigating or defending any actions whether or not resulting in any liability, insofar as such losses, claims, damages, expenses, liabilities, or actions arise out of or are based upon any contracts, transactions, agreements, representations, statements, promises, warranties, negotiations, undertakings, activities, services, expenditures, performances, benefits, or other dealings of any nature whatsoever, made by or on behalf of the Purchaser in its capacity as a limited partner of the Seller, or which are or may become incumbent upon the Purchaser by virtue of its position as a limited partner of the Seller, and for which the Purchaser is held liable as a general partner of the Seller or as a general partner with the General Partner on the basis of this Agreement, except any such losses, claims, damages, expenses, liabilities, or actions caused by specific acts or ommissions of the Purchaser (other than entering into this Agreement); provided, however, that the indemnity Agreement contained in this Section shall not apply to amounts paid in settlement of any such litigation if such settlements are effected without the consent of the General Partner and the Seller. This Indemnity Agreement is in addition to any other liability which the Seller and the General Partner may otherwise have to the Purchaser. The Purchaser agrees that within thirty

days after receipt by it of written notice of the commencement of any action against it, in respect of which indemnity may be sought from the Seller and the General Partner on account of this Indemnity Agreement, to notify the Seller and the General Partner in writing of the commencment thereof. The ommission of the Purchaser so to notify the Seller or the General Partner of any such action shall relieve the Seller and the General Partner from any liability which they may have to the Purchaser on account of the indemnity Agreement contained in this Section, but only if and to the extent that such person did not otherwise have knowledge of the commencement of the action and such persons ability to defend against the action were prejudiced such failure; provided, however, that no failure to give notice shall relieve such person from any other liability which he may have to the Purchaser.

12. Indemnity Against Claims of Morse and of the Shepherds. Except to the extent of Purchaser's investment in Seller, including that portion of the Purchase Price actually paid and any interest thereon actually paid pursuant to the Promissory Note and/or this Agreement, the Seller and the General Partner will indemnify and hold the Purchaser harmless from and against any reduction in the proportionate share of capital, net income, net loss or cash available for distribution to which the Partnership Interest entitles the Purchaser, and, except as hereinafter provided, will reimburse the Purchaser for the reduction of the Purchaser's portion of any distribution insofar as such reduction arises out of or is based upon any claims against the Partnership or its property made by Richard and/or Judy Shepherd of Salt Lake City, Utah or Wayne L. Morse of Kaysville, Utah. This Indemnity Agreement is in addition to any other liability which the Seller and the General Partner may otherwise have to the Purchaser.

13. Admission into Partnership. It is the intention of the parties hereto that the Purchaser shall be admitted as a limited partner of the Seller, but that the investment in the Seller of the Purchase Price and the grant to the Purchaser of a 25% interest in the net profits, net losses and cash available for distribution shall be effective even though the admission of the Purchaser as a limited partner of Seller is, for some reason, not effective. In this connection, the Seller and the General Partner shall use their best efforts to cause a new and appropriate amendment to the Certificate of Limited Partnership to be issued and to be filed. It is recognized by all parties that Victor R. Ayers was Seller's original general partner, and not all of Seller's limited partners have as of the date hereof consented to the substitution of the General Partner for Victor R. Ayers as general partner for the Seller, and that it may not be possible to obtain an amendment to the Certificate

of Partnership and/or written consent to admit the Purchaser as a limited partner in the Seller. Prior to and until the Purchaser is admitted to Seller as a limited partner, this Agreement shall be effective to convey to the Purchaser a 25% interest in the capital, net profits, net losses and Cash Available for Distribution which would otherwise inure to the benefit of the General Partner, except and to the extent some portion of the Partnership Interest is forfeited or resold pursuant to Section 9, above, and also to grant to the Seller a security interest in such 25% interest.

14. Power of Attorney. The General Partner shall be, and hereby is, appointed the true and lawful attorney-in-fact for the Purchaser as a Limited Partner in the Seller, with full power and authority for the Purchaser and in the name of the Purchaser, to make, execute, acknowledge, publish, file and swear to in the execution, acknowledgement, filing and recording of:

(a) Any amendment to the Certificate and Agreement of Limited Partnership necessary to effect the admission of the Purchaser as a limited partner in the Seller or the General Partner as the General Partner of the Seller, and any separate Certificate of Limited Partnership, as well as amendments thereto, as required under the laws of the State of Utah or any other state in which such instrument is rquired to be filed.

(b) Any certificates, instruments and documents including Ficticious Name Certificates, which may be required by, or may be appropriate under, the laws of the State of Utah or any other state or jurisdication in which the Partnership is doing or intends to do business.

(c) Any other instrument which may be required to be filed by the Partnership under the laws of the State of Utah or any other state or by any governmental agency, or which the General Partner deems it advisable to file, and

(d) Any documents which may be required to effect the continuation of the Partnership or admission of any additional or substituted Limited Partner, or the dissolution of the Partnership.

The foregoing grant of authority:

(a) Is a Special Power of Attorney coupled with an interest, is irrevocable, and shall survive the dissolution of the Purchaser;

(b) May be exercised by the General Partner by executing an instrument under signature of one or more of its trustees or other authorized officers as attorney-in-fact for the Undersigned whose name shall be listed in the respective instruments as a Limited Partner, assignee or assignor, as the case may be; and

(c) Shall survive the delivery of an assignment by the Purchaser of all or any part of the Partnership Interest; except that where the assignee thereof has been approved by the General Partner for admission to the Seller as a substituted limited partner, this power of attorney shall survive the delivery of such assignment for the sole purpose of enabling the General Partner to execute, acknowledge and file any instrument necessary to effect such substitution.

The Purchaser hereby agrees to be bound by all of the representations of the General Partner as his attorney-in-fact for the Purchaser and waives any and all defenses which may be available to the Purchaser to contest, negate, or disaffirm the actions of the General Partner or other successors under this power of attorney, and hereby ratifies and confirms all acts which said attorney-in-fact may take as attorney-in-fact hereunder in all respects as though performed by the Purchaser.

15. Representations and Warranties of the Purchaser. The Purchaser hereby represents and warrants to the Seller as follows:

(a) The Partnership Interest is being purchased by the Purchaser for investment only, for the Purchaser's own account, and not with a view to, or in connection with, the distribution thereof, and the Purchaser is not participating, directly or indirectly, in an underwriting of all or any portion of the Partnership Interest.

(b) The Purchaser will not take, or cause to be taken, any action that would cause the Underwriter to be deemed an "underwriter" of the Partnership Interest, as the term "underwriter" is defined in Section 2(11) of the Securities Act of 1933, as amended (the "Act").

(c) The Purchaser has received and the Purchaser or its duly authorized representative has read and hereby specifically accepts and adopts each and every provision of the form of the Certificate and Agreement of Limited Partnership of the Seller.

(d) The Purchaser (and the Purchaser's representative, if any) has had an opportunity to ask questions of, and receive answers from, persons acting on behalf of the General Partner regarding the operations and financial condition of the Seller, and has received all such information it has requested, such information being furnished solely by Victor R. Ayers, an officer of the General Partner.

(e) By reason of the Purchaser's knowledge and experience in financial and business matters in general, and investments in particular, the Purchaser is capable of evaluating the merits and risks of an investment by the Purchaser in the Partnership Interest.

(f) The Purchaser is capable of bearing the economic risks of an investment in the Partnership Interest.

(g) The Purchaser's financial condition is such that the Purchaser is under no present or contemplated future need to dispose of any portion of the Partnership Interest to satisfy any existing or contemplated undertaking, need, or indebtedness.

16. Representations and Warranties of Seller. The Seller hereby represents and warrants to the Purchaser that the Seller and the General Partner have disclosed to Purchaser all relevant information regarding the financial condition of the Seller and the General Partner and all relevant data and accounting information regarding the Sunflower project in St. George, Washington County, Utah, the principal asset of Seller.

17. Transfer Restrictions. The Purchaser recognizes that the purchase of the Partnership Interest involves a high degree of risk. The Purchaser also acknowledges that there is no public market for the Partnership Interest and that in all likelihood a public market for the Partnership Interest will not exist at any time in the future and that, therefore, the Purchaser may not be able to liquidate an investment in the Partnership Interest should the Purchaser desire to do so. It is also acknowledged that transferability is limited, and in the event of a disposition, the Purchaser could sustain a loss. It is acknowledged that the Purchaser or the Purchaser's investment representative has been given access to the same kind of information as would be furnished in a Registration Statement under the Securities Act of 1933, as amended, or has access to such information and, in addition, has access to such additional

information as deemed necessary to verify the accuracy of all information. The Purchaser acknowledges further that the Partnership Interest was acquired in a negotiated transaction with the General Partner, or its representatives. As to limitations on disposition of the Partnership Interest, the Purchaser recognizes that the Partnership Interest has not been registered under the Act, and that restrictions on transferability apply as referred to herein, which restrictions on transferability will be noted upon such certificates as may evidence the ownership of the Partnership Interest and, further, such restrictions on transferability will be noted in the appropriate records of the Seller.

The Partnership Interest, or any portion thereof shall be sold, pledged, assigned, hypothecated, or otherwise transferred, with or without consideration, (a "Transfer") only upon the conditions specified in this Section 15. The Undersigned realizes that by becoming a holder of the Partnership Interest, the Purchaser agrees, prior to any Transfer, to give written notice to the Seller expressing the desire of the undersigned to effect the Transfer and describing the proposed Transfer.

Upon receiving any such notice, the Seller shall present copies thereof to counsel for the Seller and the following provisions shall apply:

(a) If, in the opinion of such counsel, the proposed Transfer may be effected without registration thereof under the Act, and applicable state securities law (the "State Acts"), the Seller shall promptly thereafter notify the holder of the Partnership Interest, whereupon such holder shall be entitled to effect the Transfer, all in accordance with the terms of the notice delivered by such holder to the Seller and upon such further terms and conditions as shall be required by the Seller in order to assure compliance with the Act and the State Acts.

(b) If, such counsel is unable to opine that the Transfer may be effected without registration under the Act and/or the State Acts, the Transfer shall not be made unless registration of the Transfer is then in effect.

The Purchaser realizes that the Partnership Interest is not, and will not be, registered under the Act, and that the Seller does not file and does not intend to file periodic reports with the Securities and Exchange Commission pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended. The Purchaser also understands that the Partnership has not agreed to register the Partnership Interest

for distribution in accordance with the provisions of the Act or the State Acts, and that the Company has not agreed to comply with any exemption under the Act or the State Acts for the resale of the Partnership Interest. For example, the Seller has not agreed to supply such information as would be required to enable routine sales of the Partnership Interest to be made under the provisions of certain rules respecting "restricted securities" promulgated under the Act. The Purchaser acknowledges that the Partnership Interest which the Purchaser purchased pursuant hereto must be held indefinitely, unless and until subsequently registered under the Act and/or the State Acts or unless an exemption from such registration is available, in which case the undersigned may still be limited as to the amount of the Partnership Interest which may be sold.

18. General Provisions. The following provisions are a part of this Agreement:

(a) Entire Agreement. This Agreement constitutes the entire understanding and agreement between the parties hereto and supersedes all prior agreements, representations or understandings between the parties relating to the subject matter hereof.

(b) Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of the heirs, legal representatives, successors and assigns, as applicable, of the respective parties hereto, and any entities resulting from the reorganization, consolidation or merger of any party hereto.

(c) Headings. The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to limit or affect in any way the meaning or interpretation of any of the terms or provisions of this Agreement.

(d) Counterparts. This Agreement may be signed upon any number of counterparts with the same effect as if the signature to any counterpart were upon the same instrument.

(e) Severability. The provisions of this Agreement are severable, and should any provision hereof be found to be void, voidable or unenforceable, such void, voidable or unenforceable provision shall not affect any other portion or provision of this Agreement.

(f) Waiver. Any waiver by any party hereto of any breach of any kind or character whatsoever by any

other party, whether such waiver be direct or implied, shall not be construed as a continuing waiver of or consent to any subsequent breach of this Agreement on the part of the other party.

(g) Modification. This Agreement may not be modified except by an instrument in writing signed by the parties hereto.

(h) Governing Law. This Agreement shall be interpreted, construed and enforced according to the laws of the State of Utah.

(i) Attorney's Fees. In the event any action or proceeding is brought by either party against the other under this Agreement, the prevailing party shall be entitled to recover attorney's fees and costs in such amount as the Court may adjudge reasonable.

(j) Time of the Essence. The parties hereby agree that time is of the essence.

(k) Notices. All notices required or permitted to be given hereunder shall be duly given if hand delivered or mailed by certified mail, postage prepaid, to the following addresses, or to such other addresses as may be hereafter specified in writing:

If to the Seller, to:

Sunayers Limited Partnership
2120 South 1300 East
Salt Lake City, Utah 84106

With a copy to:

Charles R. Brown, Esq.
Suitter Axland Armstrong & Hanson
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

If to the Purchaser, to:

Air Terminal Gifts, Inc.
AMF Box 22031
Salt Lake City, Utah 84122

If to the General Partner, to:

Gump & Ayers Real Estate, Inc,
2120 South 1300 East
Salt Lake City, Utah 84106

With a copy to:

Charles R. Brown, Esq.
Suitter Axland Armstrong & Hanson
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

(l) Survival of Representations. The representations and covenants and agreements of the parties set forth herein shall survive the execution hereof and continue to be enforceable by the parties in any suit or cause of action at law or in equity.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the date first set forth above.

SELLER:

SUNAYERS LIMITED PARTNERSHIP,
a Utah limited partnership

By: GUMP & AYERS REAL ESTATE, INC.

By: _____
Its: President

BUYER:

AIR TERMINAL GIFTS, INC.,
a Utah corporation

By: _____
Its: President

GENERAL PARTNER:

GUMP & AYERS REAL ESTATE, INC.

By: _____
Its: President

PROMISSORY NOTE

$125,000.00

June 5, 1984
Salt Lake City, Utah

FOR VALUE RECEIVED, the undersigned promises to pay, in lawful money of the United States of America, to the Order of SUNAYERS LIMITED PARTNERSHIP, the principal sum of One Hundred Twenty Five Thousand Dollars ($125,000.00) together with interest on the unpaid balance at a variable rate which shall be calculated by adding One Percent (1%) per annum to the prime lending rate charged by First Security Bank of Utah, N.A., to its highest rated commercial customers, as adjusted from time to time (the "Prime Rate")The said principal and interest shall be paid by the undersigned at 2120 South 1300 East, Salt Lake City, Utah 84106, or at such other place as the holder hereof may designate in writing. The principal payable pursuant to this Note shall be paid in three (3) installments in the amounts and on the dates set forth as follows, together with any and all interest accrued on the remaining unpaid principal balance as of the date of each respective principal payment.

Principal	Date Due
$ 41,666.67	December 1, 1984
$ 41,666.67	June 1, 1985
$ 41,666.66	December 1, 1985

E

All payments shall be applied first to the payment of interest then to the reduction of the unpaid principal balance.

The Prime Rate may change from time to time and the interest payable on this Note shall continue to fluctuate at the same increment above the Prime Rate. Any changes in the interest rate hereunder shall become effective without prior notice on the date the Prime Rate changes.

This Note may be prepaid at any time, and from time to time, before maturity, in whole or in part, without penalty or premium. All amounts paid shall be credited first to interest and then to a reduction of the outstanding principal balance.

If any payment of principal and/or interest required hereunder is not made within fifteen (15) days after the date such payment is due, or if any other event occurs or circumstances exist which under any instrument evidencing or securing the obligations evidenced hereby entitles the holder hereof to

accelerate the maturity of such obligations, the entire sum of principal and accrued interest remaining unpaid shall, at the option of the holder hereof, become immediately due and payable without notice. Failure to exercise this option shall not constitute a waiver of the right to exercise the same at any subsequent time.

This Note, or any payment hereunder, may be extended from time to time without in any way affecting or impairing the liability of the maker or endorsers hereof.

The maker, endorsers and guarantors hereof severally waive diligence, presentment for payment, demand, protest, notice thereof, and consent to the jurisdiction of the courts of the State of Utah and to the extension of time of payment of this Note without notice, and hereby agree to pay all costs, fees and expenses, including reasonable attorneys' fees, which may arise or accrue from enforcing this Note, or in pursuing any remedy provided by the laws of the State of Utah, whether such remedy is pursued by filing a suit in equity or an action at law or otherwise.

This Note is secured by that certain Purchase and Security Agreement dated June ____, 1984. Reference is made to the Purchase and Security Agreement for additional rights of the holder hereof.

PURCHASER:

AIR TERMINAL GIFTS, INC.

By: _____
Its: President

Sunayers hereby assigns, with recourse, all of its right title and interest in the above promissory note and the agreement securing it to First Federal Savings and Loan Assn. of Salt Lake City,

Sunayers Limited Partnership
By Gump and Ayers
Real Estate Inc.
Its General Partner

_____
Victor R. Ayers, President

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION
of Salt Lake City

June 13, 1985 Loan No. 17000100-5

$85,221.31 Interest: 13.0%

ON DEMAND or 180 days after date, for value received, I, we, or
:her of us, promise to pay to the order of FIRST FEDERAL SAVINGS AND
AN ASSOCIATION at its office at 505 East Second South, Salt Lake City,
ah, the sum of EIGHTY FIVE THOUSAND TWO HUNDRED TWENTY ONE & 31/100s
llars in lawful money of the United States of America with interest
ereon, at the rate of 13.0% percent per annum, (interest computed on
e basis of 365 day year and actual days elapsed). Payable at maturity
om date of note until maturity, and thereafter at the rate of 13.0%
rcent per annum until paid. If the holder deems itself insecure of it
fault be made in payment of the whole or any part of any installment at
e time when the place where the same becomes due and payble as aforesaid,
en the entire unpaid balance, with interest as aforesaid, shall at the
ection of the holder hereof and without notice of said election at once
'come due and payable. In event of any such default or acceleration,
:e undersigned, jointly and severally agree to pay the holder hereof
:asonable attorney's fees, legal exprenses and lawful collectio costs in
ldition to all other sums due hereunder.

Tne indebtedness evidenced by this Note is secured by a Promissory
ote dated June 5, 1984, and a Security Agreement of even date.

GUMP and AYERS REAL ESTATE INC.

UE ON DEMAND: December 10, 1985

Victor R. Ayers President

2120 South 1300 East

Salt Lake City, UT 84106

MONIES NEEDED FOR SUNFLOWER

As of June 25, 1984

ITEMS DUE TO MORSE SHORTFALL

Anderson Lumber	$ 22,400.00	
Lyngle Brothers Interiors	9,550.00	
Wilkinson Electric	1,200.00	
To finish lots 42 and 52	11,000.00	
Gump & Ayers	18,600.00	
Subtotal		$ 62,750.00

ADDITIONAL ITEMS

Block Wall on East Side ($5,000 now: balance July 15)	$ 14,333.00	
Jack Smith, Architect	2,000.00	
George Staneli	2,600.00	
Wilkinson Electric	2,700.00	
Michael Sass	10,000.00	
Carport Covers (all 60)	6,294.00	
Airplane Rental	4,400.00	
Subtotal		42,327.00
TOTAL NEEDED		$104,977.00

Palmateer v. International Harvester Co., 85 Ill.App.3d 50, 53, 40 Ill.Dec. 589, 592, 406 N.E.2d 595, 598 (3 Dist.1980), *rev'd in part on other grounds*, 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981); *Stoecklein v. Illinois Tool Works, Inc.*, 589 F.Supp. 139, 145–46 (N.D.Ill.1984).

In relevant part, Count III states only that the "defendant terminated plaintiff based on the claim that 'he did not fit the image of a Reader's Digest sales person,' despite his exemplary sales record and in contravention of its policy for involuntary termination." As a result, plaintiff claims to have manifested signs of emotional distress in the form of severe depression and insomnia.

Plaintiff has failed properly to allege three of the four elements of the tort. He has not alleged that the defendant either *intended to cause emotional distress, or* that the defendant acted with such reckless disregard that it should have known that severe emotional distress was substantially certain to result. Plaintiff has not alleged any extreme or outrageous conduct by defendant. He has merely alleged that the defendant fired him without just cause, allegedly in violation of an employment contract. Such conduct is not extreme or outrageous. Nor are such allegations sufficient to withstand a motion to dismiss. *See, e.g., Stoecklein*, 589 F.Supp. at 146 & n. 9; *Pudil*, 607 F.Supp. at 444 and cases cited therein. Finally, plaintiff alleges only that he suffered severe emotional distress (and insomnia). "Severe emotional distress" is a conclusion of law which must be supported by factual allegations in the complaint. *Stoecklein*, 589 F.Supp. at 146, n. 9. Plaintiff did allege proximate cause. Plaintiff argues that, though the burden is high, his complaint is sufficient to withstand a motion to dismiss for failure to state a claim. If the only problem with this claim were the lack of factual allegations on the severity of his emotional distress, we might be inclined to agree. However, the complete lack of an allegation of outrageous conduct, and the apparent impossibility of making such an allegation given the facts which are alleged, lead us inevitably to dismiss Count III for failure to state a claim upon which relief can be granted.

Conclusion

For the reasons stated above, defendant's motion to dismiss for failure to state a claim is granted as to Count III, and denied as to Count I. Count II has been withdrawn by the plaintiff.

SUNDSVALLSBANKEN, Plaintiff,

v.

FONDMETAL, INC. and Robern International, Inc., Defendants and Third-Party Plaintiffs.

No. 85 Civ. 1453 (RWS).

United States District Court, S.D. New York.

Nov. 27, 1985.

Payee brought action to collect on a renewal promissory note. On payee's motion for partial summary judgment, and maker's cross motions for sanctions for payee's refusal to submit to discovery, the District Court, Sweet, J., held that: (1) alleged conversion of accounts receivable securing maker's obligations under note did not preclude payee from collecting note; (2) fact that payee allegedly breached its alleged duty to indemnify maker's principal against certain claims bearing no relationship to maker's obligations under note did not preclude payee's collection of note; (3) payee was a holder in due course; and (4) sanctions for payee's failure to respond expeditiously to discovery requests were not warranted.

Judgment in accordance with opinion.

1. Federal Civil Procedure ⇐2544

If opponent to summary judgment motion fails to allege that there are substantial facts in dispute, his reliance on unsubstantiated denial of accuracy of movant's affidavits is insufficient to controvert a motion for summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Civil Procedure ⇐2553

Rule 56(f) requires district court to insure that parties have reasonable opportunity to make their record complete before ruling on a motion for summary judgment. Fed.Rules Civ.Proc. Rule 56(f), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2553

Rule 56(f), requiring district court to insure that parties have reasonable opportunity to make their record complete before ruling on motion for summary judgment, is not a shield against all summary judgment motions; litigants seeking relief under Rule 56(f) must show that material sought is germane to claim or defense and is neither cumulative nor speculative. Fed. Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

4. Bills and Notes ⇐452(1)

Alleged conversion of accounts receivable securing maker's obligations under renewal promissory note did not preclude payee from collecting on that note, in that security agreement did not pertain to any specific accounts receivable, payee had no duty to protect those receivables, and payee was not aware of the alleged conversion.

5. Bills and Notes ⇐452(1)

Fact that payee allegedly breached its alleged duty to indemnify maker's principal against certain claims bearing no relationship to maker's obligations under renewal promissory note did not preclude payee's collection of note.

6. Bills and Notes ⇐353

Renewal promissory note was supported by independent consideration and, thus, was taken "for value" so as to make payee a holder in due course, where payee liberalized payment schedule on remainder of funds due on previous promissory note from maker and declined to place maker default on payments under previous no U.C.C. § 3-302.

See publication Words and Phrases for other judicial constructions and definitions.

7. Bills and Notes ⇐337

Under U.C.C. § 3-302, defining "holder in due course," it does not matter for purposes of "good faith" whether reasonable person would have known that something in transaction was amiss, but merely that holder did not know that transaction was suspect.

8. Bills and Notes ⇐332

For purposes of holder in due course status notice of defenses against an instrument means actual subjective knowledge of defenses, and not mere existence of suspicious circumstances. U.C.C. § 3-302.

9. Bills and Notes ⇐336

Fact that maker's principal allegedly notified payee that principal had suspicions that third party was converting accounts receivable securing maker's obligations under renewal promissory note did not mean that payee took note in bad faith and, thus, was not a holder in due course, in that principal did not assert such alleged conversion as excuse for nonpayment of note, and note had been executed as result of payee's willingness to renegotiate prior promissory note at behest of maker. U.C.C. § 3-302.

10. Bills and Notes ⇐337

For purposes of holder in due course status, promissory note is not taken in bad faith if payee has agreed to renegotiate a prior promissory note rather than place maker in default. U.C.C. § 3-302.

11. Bills and Notes ⇐332

Fact that maker's principal allegedly notified payee that he had suspicions that accounts receivable securing maker's obligations under renewal promissory note were being converted by third party did not constitute notice of a defense to the note so as to preclude payee's status as a holder in due course, and, thus, to preclude collection

of the note. U.C.C. §§ 3-302(1)(c), 3-304(1)(b).

12. Federal Civil Procedure ⇐1278

Sanctions for plaintiff's failure to respond expeditiously to defendant's discovery requests were not warranted, where defendant failed to show that it lacked any relevant information within plaintiff's control for purposes of responding to plaintiff's summary judgment motion. Fed. Rules Civ.Proc.Rules 37, 56(f), 28 U.S.C.A.

Carey & Deinoff, New York City, for plaintiff; Michael Q. Carey, of counsel.

Lerich & Lerich, New York City, for defendants and third-party plaintiffs; Hyman D. Lerich, Eric Moss, of counsel.

OPINION

SWEET, District Judge.

Plaintiff Sundsvallsbanken ("SVB") brings this motion for partial summary judgment under Rule 56, Fed.R.Civ.P., to collect on a renewal promissory note executed by defendants Fondmetal, Inc. and Robern International, Inc. (collectively "Fondmetal/USA") in favor of SVB. Fondmetal/USA opposes the motion for partial summary judgment claiming that it is entitled to pursue additional discovery under Rule 56(f) of the Federal Rules of Civil Procedure, and cross-motions for an order pursuant to Rule 37(d) imposing sanctions against SVB for refusal to submit to discovery in this action. For the reasons set forth below, SVB's motion for partial summary judgment on the note is granted, and Fondmetal/USA's motion for sanctions is denied.

Facts

The following facts are undisputed except as noted.

This action arises from the division of the business affairs of defendants and their principal Bernt C. Rathaus ("Rathaus") from those of Fondmetall/AB, a Swedish company, and its principal Anders J. Lofberg ("Lofberg"). In order to terminate and dissolve their joint venture in 1984, Rathaus, Lofberg, SVB and to a lesser extent Skandinaviska Enskilda Banken ("SEB") entered into a complex series of agreements. On June 7, 1984 Rathaus sold Lofberg all the shares of common stock which Rathaus owned in Fondmetall/AB, the Swedish company. On the same day, Lofberg and Rathaus agreed that Fondmetal/USA owed Fondmetall/AB $1,400,000.00 and entered into a Settlement and Security agreement ("Settlement Agreement"). The agreement provided that Fondmetal/USA would pay Fondmetall/AB $1,400,000.00, as evidenced by a promissory note ("Note A") which was simultaneously executed and delivered with the agreement and as part consideration for the redirection of the amount which Fondmetall/AB claimed it was owed. Fondmetall/AB received a security interest in and lien upon all of Fondmetal/USA's accounts and chattel papers. The Settlement Agreement also provided that Fondmetall/AB could assign its rights under the agreement, and all the rights and obligations under the agreement would inure to the benefit of and be binding upon the assignee. Also on June 7, 1984, the parties executed two Limited Release and Indemnification Agreements ("Indemnification Agreements").

In the first indemnification, Fondmetall/AB and Lofberg released Fondmetal/USA and Rathaus from certain obligations and claims, and in turn they agreed to indemnify Fondmetall/AB and Lofberg from acts of Rathaus, the companies or officers up to June 7, 1984. In the second indemnification agreement, Fondmetal/USA and Rathaus released Lofberg and Fondmetall/AB from certain obligations and in return Lofberg and Fondmetall/AB agreed to indemnify Fondmetal/USA and Rathaus with respect to activities of the Swedish company or its officers up to June 7, 1984.

Finally, on June 7, 1984, Fondmetall/AB assigned Note A to SVB, a note which was to be paid in four installments beginning August 1, 1984, ending July 1, 1985 Simultaneously, Fondmetall/AB also assigned its rights under the Settlemen

Agreement to SVB. Each assignment was agreed to by Fondmetal/USA, and each assignment provided a conditional indemnification agreement for the benefit of Fondmetal/USA which by its terms indemnified the companies against any claim which SEB might make against them in relation to the Fondmetall/AB default:

> ... in the performance of a loan granted by [SEB] to [FONDMETALL] in the principal amount of U.S. $290,000. The agreement by [SVB] to hold [FONDMETAL/USA] harmless shall not include any other claim which [SEB] may have against [FONDMETAL/USA] for any other reason whatsoever.
>
> The agreement by [SVB] to hold [FONDMETAL/USA] harmless as set out above shall not entitle them to a setoff against or in any way limit the [Fondmetal/USA] obligations under the Promissory Note or the Assignment to [SVB] by [Fondmetall] of all its rights under said Promissory Note ...,"

Neither assignment provides for personal indemnification of Rathaus. (Exh. D, Rathaus Affidavit of 7/7/85 Doc. # 1 & 2).

After the completion of these agreements, Fondmetal/USA began making payments to SVB under Note A.[1] However, in October of 1984, Rathaus informed SVB that he would be unable to meet the payment schedule under Note A, and on October 31, 1984 the parties entered into an amended Settlement Agreement and a renewed promissory note ("Note B"). Similar events resulted in another amended Settlement Agreement and renewed promissory note ("Note C") on January 24, 1985. The amount of Note C was $450,000.00, Fondmetal/USA having paid $950,000.00 pursuant to Notes A and B. These amendments altered the payment schedules for the indebtedness to Fondmetal/USA's benefit, but provided for the immediate accrual of interest on all principal amounts outstanding under the renewal notes. Fondmetal made no payment on Note C, and SVB commenced this suit to recover the monies due.

Discussion

All doubts must be resolved and all reasonable inferences must be drawn in favor of the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam); *United States v. One Tintoretto Painting Entitled "The Holy Family with Saint Catherine and Honored Donor"*, 691 F.2d 603, 606 (2d Cir.1982). This Circuit has long endorsed a policy of allowing the development of a full factual record through trial of the issues presented, a policy which is limited by the grant of summary judgment. *See Jaroslawicz v. Seedman*, 528 F.2d 727, 731 (2d Cir.1975).

[1] The burden faced by the moving party should not, however, be made so insurmountable as to vitiate summary judgment relief. If the opponent to the summary judgment motion fails to allege that there are substantial facts in dispute, his reliance on an unsubstantiated denial of the accuracy of the movant's affidavits is insufficient to controvert a motion for summary judgment. *Project Release v. Provost*, 722 F.2d 960, 968 (2d Cir.1983); *see WIXT Television, Inc. v. Meredith Corp.*, 506 F.Supp. 1003 (N.D.N.Y.1980).

[2, 3] Fondmetal/USA has interposed legal defenses against the collection on the promissory note, and has requested postponement of the motion pursuant to Rule 56(f) asserting the need for added discovery of information under SVB's control. Rule 56(f) requires the court to ensure that the parties have a reasonable opportunity to make their record complete before ruling on a motion for summary judgment.

1. The parties are in dispute over what reasons were given for the inability to meet the Note A payment schedule. While Rathaus and SVB agree that Rathaus mentioned that he suspected Lofberg of unlawfully converting accounts receivable of Fondmetal/USA, Rathaus claims that he offered this conversion as the reason why he could not make payments. SVB, however, submitted a telex of October 29, 1984 from Rathaus to Mr. Thord Soderlund (SVB's Executive Vice President), explaining that the inability to pay was the result of a delayed shipment from China. (Affidavit of Pelle Deinoff, Exhibit 2).

Berne Street Enterprises v. American Export Isbrandtsen Co., 289 F.Supp. 195 (S.D.N.Y.1968). However, Rule 56(f) is not a shield against all summary judgment motions. Litigants seeking relief under the Rule must show that the material sought is germane to the defense, and that it is neither cumulative nor speculative. *Quaker Chair Corp. v. Litton Business Systems, Inc.*, 71 F.R.D. 527, 533 (S.D.N.Y.1976). "A 'bare assertion' that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir.1981). Fondmetal/USA's three major opposition claims will be considered in light of these summary judgment and Rule 56(f) standards.

Conversion claim

Fondmetal/USA claims that SVB is not entitled to collect on the promissory note because it assisted in, or at least had knowledge of, an alleged conversion of certain of Fondmetal/USA's European accounts receivable by Rathaus' estranged partner Lofberg and Fondmetall/AB. According to Rathaus, SVB should bear responsibility for the conversion because it was aware that the conversion was taking place and knew that the accounts receivable were the assets which Fondmetal/USA was liquidating to pay the loan installments. Rathaus charges that SVB was Lofberg's partner in the negotiation of Note A and the related documents, including the Settlement Agreement, which provided in part:

> 4. In consideration of the reduction of the amount claimed by [Fondmetall/Sweden], each Debtor [e.g., Fondmetal/USA and Robern] hereby grants to [Fondmetall/Sweden] *a continuing security interest in and lien upon all of the Debtor's accounts and chattel paper now or hereafter existing or acquired* and all proceeds and products thereof (the "Collateral"), as security for the due payment of all of the indebtedness of the Debtors to [Fondmetall/Sweden], up to a maximum amount of $1,400,000.

(Rathaus Reply Affidavit of 9/23/85 (emphasis supplied)).

According to Fondmetal/USA, this provision in the original Settlement Agreement, subsequently adopted by SVB in the assignments and revisions resulting in Note C, demonstrates that SVB knew that these accounts receivable were security for the notes and were the source of payment on the Notes. Rathaus also contends that if permitted to continue discovery along this vein, he may demonstrate that SVB was a co-tortfeasor in the diversion of the accounts receivable.

[4] Even viewed in a light most favorable to Fondmetal/USA, the party opposing the motion, Fondmetal/USA's conversion defense fails to assert a legal bar to the entry of summary judgment on the note and could only support a request for increased discovery on a conversion counterclaim against SVB and Lofberg. Fondmetal/USA has not established that SVB had any duty to protect these receivables, that SVB interfered with Fondmetal's collection of the receivables, or that it would make any difference whatsoever to collection on the note if they had been able to establish such a breached duty.

The above quoted passage in the Security Agreement explicitly refers to a security interest in "all of the Debtor's accounts and chattel paper," and does not earmark any specific account, European or otherwise, as the security for the undertaking. Assuming *arguendo*, that Fondmetal/USA had even claimed that there was such a specific understanding about the collateral, it would not change the fact that this passage does not create a duty upon SVB or any other party to preserve the underlying accounts receivable. Because SVB was not the beneficiary of this alleged conversion of the accounts receivable it works as much to SVB's disadvantage as it does to Rathaus' disadvantage, as SVB is the lien creditor being deprived of its security interest in the accounts. While an alleged con-

version by either Lofberg or SVB might be a defense against SVB's collection on the Settlement Agreement, it does not establish a defense as to collection on Note C, an independent promissory obligation. The New York Courts have enforced this separation between actions against holders of promissory notes and actions asserting fraud in connection with the security given in exchange for these notes. *See Reid v. Budget Credit*, 5 Misc.2d 949, 162 N.Y.S.2d 750, 752 (Sup.Ct., Kings Cty., 1957) ("The wage assignment contract was purportedly given as collateral security for the payment of an alleged promissory note. The respondent may be found to be a holder in due course of such a note. But as regards its rights under the assignment of wage contract, the assignee takes subject to any defenses or infirmities thereof since it is not a negotiable instrument"). *Accord, Edwards v. Budget Credit*, 8 Misc.2d 897, 167 N.Y.S.2d 583, 586 (Sup.Ct., Kings Cty., 1957); *Cajuste v. Budget Credit, Inc.*, 5 Misc.2d 948, 162 N.Y.S.2d 748 (Sup.Ct., Kings Cty., 1957).

Furthermore, Fondmetal/USA has not produced written evidence other than the Settlement Agreement that it was relying on the payments of these accounts receivable to meet its obligations on the Note. SVB has produced a telex from Fondmetal/USA stating that the basis for its failure to meet the payment schedule under Note B was a delayed shipment of goods without reference to the alleged conversion.

In short, SVB's rights under the promissory Note C are independent of any conversion claim against SVB based on the security agreement lien provisions,[2] and Fondmetal/USA has not cited any authority for the proposition that the security agreement pertains to any specific accounts receivable, that anyone had any duty to protect those receivables, or that Fondmetal has a basis for believing that SVB was aware of this alleged conversion.

Indemnification against claims of SEB

Fondmetal/USA's second defense against summary judgment is that SVB breached its duty to indemnify Rathaus against claims deriving from a guaranty which Rathaus executed on an account maintained by Fondmetall/AB at SEB.

However, neither of the two indemnification agreements negotiated in connection with the assignment of the note and security agreement purports to indemnify Rathaus, but extends by their terms only to the liabilities of Fondmetal, Inc. and Robern International. In addition, they indemnify these companies only as to claims made against a loan granted by SEB in the principal amount of $290,000.00 and not an action on the Overdraft Facility account which Rathaus personally guaranteed [3] and upon which he is being sued upon as guarantor.

Rathaus contends that an omission of his name from the language of this indemnity was a "drafting error" and he has submitted copies of his attorney's letters to SVB requesting the correction of this error. SVB counters that the personal guaranty of Rathaus was specifically excluded from the initial release and indemnity agreement, indicating that the parties were very aware of the two distinct Fondmetall/AB accounts at SEB, and that they did not intend to bring the Overdraft Checking Facility into the scope of the indemnity provisions:

> *Limited Release and Indemnification Agreement*
>
> "1) Except for the full performance of any and all of the terms and conditions of a certain agreement ... and for the enforcement of any claims that may be

2. For the purposes of this motion, Fondmetal/USA's assertion is accepted to the effect that despite the repeated assignments and renewals of the promissory notes, SVB stands in the shoes of Lofberg for the purposes of the Security Agreement negotiated in conjunction with Note A.

3. Fondmetall/AB maintained two accounts at SEB, only one of which was guaranteed by Rathaus.

made under a personal guaranty from Bernt C. Rathaus to SE Banken, Sweden, for the debt of Fondmetall/AB, ..." (Rathaus Affidavit 7/7/85, Exhibit B, doc. 2) (Limited Release and Indemnification Agreement).

[5] However, even if SVB *had* breached such a duty to indemnify Rathaus, it does not affect Fondmetal/USA's obligation under Note C. The indemnity agreement itself provides that "The agreement by [SVB] to hold [Fondmetal/USA and Robern International] harmless as set out above shall not entitle them to a setoff against or in any way limit [Fondmetal, Inc. and Robern International's] obligations under the Promissory Note or the Assignment to [SVB] by [Fondmetall/AB] of all its rights under said Promissory Note ...," (Rathaus Affidavit 7/7/85 Exhibit D, Docs. 1 & 2). The claim on this indemnity agreement thus cannot block summary judgment on Note C against Fondmetal/USA because even if established it bears no relationship to the obligation under the promissory note.

Holder in due course

In another attempt to forge a legal link between the allegedly unlawful acts of Lofberg and his company and SVB, Fondmetal/USA charges that SVB does not qualify as a holder in due course under section 3-302 of the Uniform Commercial Code, and is thus subject to all of the claims and defenses against payment on the note available pursuant to section 3-306 [4] of the Code, in this case the conversion and indemnification claims discussed above.

However, a survey of the requirements for holder in due course status indicates that SVB has met the prerequisites set out in 3-302:

(1) A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the party of any person.

[6] Fondmetal/USA first claims that the Note was not taken "for value" because Fondmetall/AB assigned the note to SVB in satisfaction of an extant debt. Whatever the merits of this argument, it is one which relates to Note A, and not Note C, the one at issue in this motion. Note C was negotiated between SVB and Fondmetal/USA and was supported by independent consideration. It is undisputed that SVB liberalized the payment schedule on the remainder of the funds due on the note when Note C was executed, and declined to place Fondmetal/USA in default on the payments under Note B (Deinoff Affidavit, 9/12/85, Exhibit B).

[7-9] Fondmetal/USA also asserts that SVB did not take the note in "good faith" because Rathaus had notified SVB that he had suspicions that Fondmetall/AB was converting the European accounts receivable of Fondmetal/USA. Good faith under Code section 3-302 is governed by its definition in section 1-201(19) which provides:

(19) "Good Faith" means honesty in fact in the conduct or transaction concerned.

Under this subjective standard it does not matter whether a reasonable person would have known that something in the transaction was amiss, but merely that the holder did not know that the transaction was suspect. *Chemical Bank of Rochester v. Haskell*, 51 N.Y.2d 85, 432 N.Y.S.2d 478, 411 N.E.2d 1339 (1980). Fondmetal/USA asserts that because Rathaus notified an SVB officer that he had suspicions of conversion before the execution of the note that this was enough to convert acceptance of Note

4. Section 3-306 provides in relevant part:

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and

C into an act of bad faith. However, the facts surrounding the execution of Note C cannot support a charge of bad faith. As will be discussed under the question of notice *infra*, notice of defenses against an instrument means actual subjective knowledge of defenses, and not the mere existence of suspicious circumstances. *Travelers Indemnity Company v. American Express Co.*, 559 F.Supp. 452 (S.D.N.Y.1983).

[10] When Note B was extinguished and Note C was executed, Rathaus did not assert this alleged conversion as an excuse for non-payment of the note which weakens his claim that the notice was sufficient to make SVB an actor in bad faith. Furthermore, SVB renegotiated the note at the *behest* of Rathaus and Fondmetal/USA, and granted this extension of time to accommodate a payor who had already paid $950,000.00 of a $1,400,000.00 loan. Fondmetal/USA has cited no authority which makes it bad faith to renegotiate a promissory note rather than place the payor in default.

[11] Related to this charge of bad faith is Fondmetal/USA's belief that this same notice of Lofberg's conversion is notice of a defense or claim under 3–302(1)(c). This contention ignores the wording of the statute and its definitional counterpart in section 3–304. Section 3–302(1)(c) speaks of notice of any "defense against or claim *to it* on the part of any person." (emphasis supplied), meaning a defense on the instrument in question, and not on the collateral Security Agreement. Section 3–304(1)(b) reinforces the nature of this notice of a defense by providing:

> (1) The purchaser has notice of a claim or defense if ...
>
> (b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

Official Comment 3 to this section provides that the inclusion of the word "voidable" is meant to restrict the provision to notice of a defense which will permit any party to avoid his original obligation on the instrument as distinguished from a setoff or counterclaim. Thus Rathaus' notice to SVB that Lofberg might have breached the provisions of the Security Agreement would not be notice of a defense or claim pursuant to sections 3–304 and 3–302 of the Code. Although Fondmetal/USA can maintain a counterclaim based on these charges, its existence will not deprive SVB of its status as a holder in due course and will not prevent the entry of summary judgment. *See Maglich v. Saxe, Bacon & Bolan, P.C.*, 97 A.D.2d 19, 468 N.Y.S.2d 618 (App.Div. 1st Dept.1983).

Discovery Sanctions

[12] Fondmetal/USA has moved pursuant to Rule 37 of the Federal Rules of Civil Procedure for an order imposing sanctions on SVB for failure to respond expeditiously to discovery requests. Sanctions are unwarranted in this case in view of the circumstances surrounding the SVB's summary judgment motion. On June 12, 1985, this court provided for discovery to be completed by November 6, 1985. However, on July 15, 1985, SVB filed a motion for summary judgment, staying all discovery pending the resolution of this motion. In view of the fact that Fondmetal/USA has failed to show that it lacks any relevant information within SVB's control for the purposes of its Rule 56(f) claim, sanctions for failure to produce such information are not indicated. Of course, Fondmetal/USA will be able to undertake continued discovery with regard to its counterclaims against SVB and third party defendants Lofberg and Fondmetall/AB.

Fondmetal/USA has not disputed that it executed an unconditional promissory note in favor of SVB and that it has defaulted on the payments due under such note. Because no material dispute of those facts exists, and no further discovery under Rule 56(f) is warranted, SVB is entitled to partial summary judgment on Note C.

Submit judgment on notice.

IT IS SO ORDERED.